Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 311 OF 1982
EDGAR JOSEPH JR SCJ
20 MARCH 1993

Civil Procedure *— Amendment of pleadings — Joinder of defendants after issue of writ — Whether effect of amendment was to introduce new cause of action*

Civil Procedure *— Amendment of pleadings — Time limit to file amended statement of claim — Whether amended statement of claim served within 14-day time limit — Rules of the High Court 1980 O 20 r 9*

Civil Procedure *— Estoppel — Res judicata — Interlocutory judgment — Dissolution of interlocutory injunction — Whether dissolution meant plaintiffs had no interest in land and claim was barred by res judicata and issue estoppel*

Civil Procedure *— Locus standi — Joint claim for losses sustained — Non-joinder of party — Whether fatal to plaintiff's claim — Rules of the High Court 1980 O15 r 6(1)*

Civil Procedure *— Locus standi — Whether plaintiffs had title to land to be able to maintain suit — Whether gift of land valid — Whether assignment required writing — Whether Statute of Frauds applicable*

Contract *— Agency — Apparent or ostensible authority — Doctrine of 'holding out' — Question of fact — Onus of proof rests on person dealing with agent*

Contract *— Damages — Exemplary damages — Principles applicable in awarding such damages*

Contract *— Damages — Quantum of compensatory damages — Proof of special damages necessary — Remoteness — Method of proving market price*

Contract *— Promissory estoppel — Promises and assurances made to plaintiffs — Whether availability of promissory estoppel depended on availability of specific performance*

Contract *— Proprietary estoppel — Detrimental acts done in reliance on belief that interest would be obtained — Principles applicable akin to constructive trusts*

Contract *— Proprietary estoppel — Where representee builds and improves land of another — Arises where representor's conduct would render it unconscionable for him to insist on his strict legal rights*

Contract *— Terms of contract — Conditions on receipts — Effect of receipts containing conditions incorporated subsequent to contract — Conditions in English and not understood by plaintiffs — Whether plaintiffs had accepted conditions — Onus of proving contractual force of the conditions*

Evidence *— Admissions — Admissibility of admissions by non-party — Evidence Act 1950 s18(3)*

A ***Evidence*** *— Adverse inference —Plaintiffs' failure to adduce evidence of old receipts — Whether adverse inference could be drawn — Evidence Act 1950 s 114(g)*

Evidence *— Burden of proof — Allegation of particular facts — Onus of proving contractual force of conditions on receipts — Onus of proving apparent or ostensible authority*

B

Evidence *— Hearsay — Admissibility — Evidence of promises and assurances which had induced plaintiffs to act to their detriment — Whether hearsay evidence*

Land Law *— Estoppel — Promises and assurances made to plaintiffs — Plaintiffs invested money and incurred expenditure based on assurances — Whether there was equity*
C *or equitable estoppel protecting plaintiffs' occupation of land*

Land Law *— Proprietary estoppel — Unregistered interest in land — Whether interest binding on registered lessee — National Land Code 1965 s 206(3)*

Landlord and Tenant *— Oral agreement — No written tenancy agreement —*
D *Subsequent conditions incorporated in rent receipts issued to tenants — Tenants did not understand conditions in English — Whether condition as to notice to quit effective*

Landlord and Tenant *— Termination of tenancy — Notice to quit — Relevant factors in determining sufficiency of notice to quit — Reasonable period of notice to quit*

E ***Tort*** *— Trespass to land — Intentional act — Mistake no defence — Damages*

The plaintiffs' family had been staying on part of holding Nos 3532 and 2497, Mukim 13, NED, Penang ('the plot concerned') for more than 100 years, on which were situated their two dwelling houses ('the two dwelling houses') No 258K and No 259H respectively, and their
F vegetable farm ('the farm'). The registered proprietor of holding No 3532 ('Thean Teik Estate') were and are the trustees of the Khoo Kongsi. P2's grandfather's (Cheong's) family had converted what was once swampy jungle land into a productive farm. On Cheong's death, P2 took over management of the farm, which was worked on by the
G family members. House No 258K had been on the plot concerned before December 1938 and, in 1972, P1 and P2 were registered as tenants in place of Cheong. House No 259H was built by Cheong in 1963 with the consent of the Khoo Kongsi and registered in the name of P2. After Cheong's death, P2 spent RM1,500 in providing a ceiling for the house. No conditions were printed on the rent receipts issued
H to Cheong and P2 until late 1981. Conditions, which were in English, were endorsed on receipts for the farm after 1976 and for the two dwelling houses in 1981. The plaintiffs were illiterate farmers and could not understand these conditions which included a condition that a period of one month's notice would be sufficient to terminate
I the tenancy. Some time in 1972, P2 was informed by the visiting trustee of the Khoo Kongsi that it was not necessary to change the tenancy into her name and that she could continue planting vegetables as long as she wished provided she paid rent. Cheong had also told P2

that the Khoo Kongsi had assured him that so long as he continued to pay ground rent, he could stay and cultivate the farm and, upon his death, the tenancy was to continue for the benefit of his family, so long as the family continued to pay the rent and cultivate the farm. After the assurance given by the visiting trustee, the plaintiffs invested RM12,000 in installing a sprinkler system. For more than 50 years, neither the Khoo Kongsi nor anyone else had interfered with the farming activities of the plaintiffs' family. The interference only commenced after the Khoo Kongsi had entered into a joint-venture agreement with the defendants, whereupon the Khoo Kongsi gave one month's notice of termination to the plaintiffs.

The plaintiffs (P1, P2 and P3) claimed that at all material times, they were and are lawful and protected tenants and that they were entitled in law and equity to possession of the plot concerned. The plaintiffs' claim against the defendants was founded on trespass and nuisance allegedly committed by the defendants. The reliefs prayed for by the plaintiffs were for: (i) aggravated and exemplary damages for trespass and nuisance, with interest thereon; (ii) a permanent injunction restraining the defendants, themselves or their servants and/or agents or otherwise howsoever from entering, trespassing and/or carrying out works on the plot concerned; and (iii) costs.

The defendants raised various issues, including certain preliminary issues, namely: (i) the effect of the joinder of D3 and D4 after the issue of the writ was an attempt to raise a new cause of action; (ii) the plaintiffs ought not to have been given leave to re-amend the statement of claim to include a claim for trespass against D3 and D4; (iii) there was non-compliance with O 20 r 9 of the Rules of the High Court 1980 ('the RHC'); (iv) the suit was bad for non-joinder and lack of locus standi; and (v) the plaintiffs' claim was barred by res judicata and issue estoppel. The substantive issues raised were: (i) what the area of the plot concerned was and whether the plaintiffs had possession of the plot concerned, the two dwelling houses and the farm; (ii) what notice to quit was necessary to determine the plaintiffs' tenancies of the farm and the two dwelling houses; (iii) whether, as the tenancies were not registered and operated as monthly tenancies, a month's notice was sufficient to terminate the plaintiffs' tenancies; (iv) whether service of the notice to quit was effective; (v) whether house No 258K was subject to the Control of Rent Act 1966; (vi) whether an equity or equitable estoppel protected the plaintiffs' occupation of the plot concerned; (vii) whether the availability of equity depended on the availability of specific performance; (viii) whether the plaintiffs' tenancies were binding on D1 and/or D3; (ix) whether a promissory estoppel arose; (x) whether a proprietary estoppel arose and the extent of the plaintiffs' equity; and (xi) the measure of damages to be awarded.

Held, allowing the plaintiffs' claims:

(1) Based on the evidence before the court, it was obvious that the cause of action against D3 and D4 arose from the alleged wrongdoing committed by them before they were joined as

defendants and the plaintiffs were not introducing any fresh cause of action. At the hearing of the application for joinder of D3 and D4, counsel for the defendants had raised no objection thereto and the objection now had been raised at a very late stage when perhaps any cause of action against D3 and D4 would be barred by limitation. Therefore, it would be neither right nor fair to entertain the objection now. Moreover, if the objection had been taken on the hearing of the application for leave to amend, the plaintiffs could have issued a fresh writ citing D3 and D4 as defendants and then applied for consolidation of the two actions.

(2) Given the chronology of events in respect of the application to re-amend the statement of claim to include trespass by D3 and D4, and there being no objection for to the application, leave was properly given.

(3) The plaintiffs' solicitors had properly filed the re-amended statement of claim in the registry of the court within the time limited for doing so, although the registry had yet to return the document at the date of the trial. The plaintiffs could not have done anything more and such lack of diligence as there was must be ascribed to the registry and not the plaintiffs' solicitors. There was no breach of O 20 r 9 of the RHC.

(4) The term locus standi or standing in a court of law means entitlement to judicial relief apart from questions of the substantive merits and the legal capacity of a plaintiff. There are two principles to bear in mind: first, the court is bound to proceed on the basis that everything alleged in the statement of claim and in the documents relied on is true; and secondly, the jurisdiction to uphold a plea of no locus standi should only be exercised where there is no possibility of doubt. The objection to non-joinder was only taken at a very late stage in the submissions of the defendants' counsel and O 15 r 6(1) of the RHC states that no action shall be defeated by reason of non-joinder of any party.

(5) It is true that if several persons are joint owners of any land or premises affected by trespass, they should all, as a rule, be joined as co-plaintiffs. However, it could reasonably be inferred from the evidence that P2 was in the position of a constructive trustee of the farm for the benefit of herself, the other plaintiffs and PW1 and consequently, P2 alone could maintain the suit to protect trust property. There was therefore, locus standi.

(6) The gift of the farm to the plaintiffs and PW1 had been perfected by their possession and cultivation of the farm during Cheong's lifetime and thereafter, and therefore the Statute of Frauds 1677 had no application. This was not an action based on any contract for the sale or other disposition of land, or any interest in land.

(7) Dissolution of an interlocutory injunction does not constitute res judicata or issue estoppel in determining the issues finally.

The legal effect of the refusal of the interlocutory injunction was simply, that at the interlocutory stage, based on the limited material then available, the plaintiffs were not entitled to the injunctive relief claimed.

(8) The area in the possession of the plaintiffs was at all material times to this suit, 2.8 acres or approximately 121,619sq ft.

(9) A receipt is in law only evidence of the payment of a sum of money; it does not constitute a contract nor can it have the effect of an estoppel. The true intention of the parties must be established by evidence at the trial. There was no evidence that the conditions appearing in the rent receipts in respect of the farm or the two dwelling houses had been introduced from the inception of the tenancies nor was there anything to show that the plaintiffs, or their ancestors, who had no knowledge of the English language, could be said to have accepted the 'conditions'. The onus of proving that the conditions on the receipt had contractual force was upon the defendants who were relying on the same and not upon the plaintiffs to prove the converse. No adverse inference could therefore be drawn against the plaintiffs for this omission. That the plaintiffs themselves had used the rent receipts bearing the conditions aforesaid as evidence, does not in any way debar them from contending at the final hearing that those conditions were invalid in law. The conditions appearing in the rent receipts were devoid of legal effect and must be disregarded in considering the question of the sufficiency of the notice to quit.

(10) Whilst the mode of payment of rent was an important factor in determining the question of the sufficiency of the period of a notice to quit it, was not necessarily a decisive factor. Therefore, although rent had been paid on a monthly basis, it did not necessarily follow that the tenancy could be determined by a month's notice. Where there was no written tenancy agreement to construe the nature of the tenancies, factors to be taken into account included not just mode of payment of rent but also the conduct and intention of the parties, the contemplated user of the subject matter of the tenancies and other relevant circumstances of the case as a whole. On the facts, three months' notice would be reasonable for the determination of the tenancies of the farm and the two houses as this would afford the plaintiffs sufficient time within which to harvest their crops and to yield vacant possession of the plot concerned.

(11) Notices to quit are validly served if left at the premises.

(12) As the requirements of s 16(1) of the Control of Rent Act 1966 were not satisfied, the court had no jurisdiction to make an order for possession in favour of the defendants in respect of dwelling house No 258K.

(13) On the evidence, promises and assurances had been made by the Khoo Kongsi first to Cheong that so long as he or his family continued to pay ground rent he could stay and cultivate the

farm as long as he wanted and relying on the same he and his family had converted what was once a swampy land into a productive farm. He had also built the two dwelling houses with the consent of the Khoo Kongsi. The plaintiffs had invested money and incurred substantial expenditure based on the assurances. On the evidence, the tenancies held by Cheong were not just for his benefit but also for the benefit of his family and these tenancies were not merely monthly tenancies.

(14) In respect of evidence relating to promises or assurances made by the visiting trustee, it was well established that such evidence was not hearsay and was admissible as it was proposed to establish not the truth of the statement, but the fact that it was made. Such a statement is frequently relevant in considering the mental state and conduct thereafter of the witness. Evidence of statements made to P2 by Cheong or assurances made by the Khoo Kongsi had been adduced for the purpose of showing that those promises or assurances had induced Cheong and the plaintiffs to act in a manner to their detriment.

(15) Statements which are admissions made by a non-party to the suit are admissible by virtue of s 18(3) of the Evidence Act 1950.

(16) The doctrine of 'holding out' sometimes called apparent or ostensible authority has been said to be based upon estoppel. Agency by estoppel arises where one person has acted by allowing the agent to hold himself out as having authority, so as to lead another to believe that he had authorized a third person to act on his behalf, and that other in such belief, enters into transactions with the third persons within the scope of his ostensible authority. The onus rests on the person dealing with the agent to establish real or ostensible authority and the conduct said to amount to holding out must be proved affirmatively. It was a question of fact in a particular case whether ostensible authority existed for the particular act in respect of which liability was sought to be imposed upon the principal. Having regard to the evidence, the plaintiffs had succeeded in proving, on the balance of probabilities, that the visiting trustee was held out as having power to deal with the tenants on behalf of the Khoo Kongsi, including the power to make the promises and assurances aforesaid, upon which the plaintiffs had relied and incurred substantial expenditure.

(17) The doctrine of promissory estoppel provides a defence to an action on the original contract for a defendant relying on a voluntary variation. It does not provide a cause of action for a plaintiff relying on a gratuitous promise. Yet, its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist. On the facts, the plaintiffs and their forbears had been in possession of the plot concerned for decades and they had commenced these proceedings relying on equity or equitable estoppel. The plaintiffs' claim to the alleged equity

did not depend on the availability of the remedy of specific performance.

(18) Pursuant to the joint-venture agreement, D3 became the registered lessee of Lot 3523 and held the lease on trust for and was the alter ego of the Khoo Kongsi. It follows that D3 would be in no better position to resist the plaintiffs' claim to be entitled to be in possession in law and equity than would the Khoo Kongsi itself. Moreover, as successors-in-title with notice of the plaintiffs' interest in the plot concerned, D3 would have to take its lease subject to that interest. The validity of contracts relating to land or any interest therein is declared in s 206(3) of the National Land Code 1965 ('the Code') and are not defeasible. The court was therefore unable to accede to the submissions of counsel for the defendants that the protection of indefeasibility guaranteed under s 340(1) of the Code enabled D3 to take its lease free of the plaintiffs' interest in the plot concerned.

(19) Proprietary estoppel is one of the exceptions to the general rule that a person who spends money on improving the property of another has no right to claim reimbursement or any proprietary interest in property. Unlike promissory estoppel, proprietary estoppel, when it operates, is permanent in its effect and it is also capable of operating positively so as to give a cause of action. Independent consideration is not an essential requirement for the operation of proprietary estoppel and it is not essential that the representator must have knowledge that his property is being improved. The representator's conduct and the subsequent action and belief of the representee may render it unconscionable for the representator to insist on his strict legal rights. If such a person builds or improves the land of another knowing he was doing so on land belonging to another, there would still arise an equity in him if the landowner led such person to expect to be allowed to stay there.

(20) The principles which apply to constructive trusts are closely akin to those underlying the doctrine of proprietary estoppel. In both, the claimant must have acted to his detriment in reliance on the belief that he would obtain an interest, and equity acts on the conscience of the legal owner to prevent him from defeating the common intention. In some cases, like this one, proprietary estoppel is a form of constructive trust.

(21) The person making the expenditure or the improvement on another's land should be to protected against interference for as long as he would be prejudiced thereby. Having regard to the fact that the plaintiffs and their ancestors had been living on the plot concerned, cultivating the farm and the substantial sums of money which must have accrued to them and their ancestors by way of profit thereby over a period of several decades, and the further fact that the plaintiffs had enjoyed rent-free occupation for the last decade or so, the plaintiffs had had 'sufficient

satisfaction' for their labour and expenditure on the plot concerned or, in other words, the prejudice suffered by them had been fully satisfied, and so, they were entitled to no relief.

(22) The defendants had committed acts of trespass and nuisance on the plaintiffs' land, of which they (plaintiffs) had lawful possession.

(23) The general rule as to the measure of damages is that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable. Where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can.

(24) The normal way or method of proving market value in the case of a resale of goods in bulk would be to call the customers or at the least, where the parties agree to documentary evidence, to tender documents showing the existence of and a dealing with customers. A plaintiff's unsupported assertion that he would receive such and such a price for his fruits or vegetables does not prove market value, much less that he had a market. To allow this would dispense with proof of quantum altogether.

(25) Exemplary damages could only be awarded in three categories of cases, namely, oppressive action of officers of the Crown; secondly, cases where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk; and thirdly, where statute expressly authorized it.

(26) Trespass is normally associated with intentional acts even though committed by mistake, for mistake is no defence and is no answer to the claims for exemplary damages, having regard to the particular circumstances of this case.

(27) Awards of exemplary damages should be moderate and the resources of the parties was a relevant consideration. The other factors which must be taken into consideration are the quantum of the compensatory award as well as the conduct of the parties right down to the time of the judgment. Any sum which the court awards by way of exemplary damages for the acts of trespass must reflect the gravity of the wrongdoing.

[Bahasa Malaysia summary

Keluarga plaintif telah menduduki sebahagian daripada pegangan No 3532 dan No 2497, Mukim 13, NED, Pulau Pinang ('petak berkenaan') selama lebih daripada 100 tahun, di atas mana terletak dua rumah kediaman mereka ('dua rumah kediaman itu'), iaitu No 258K dan No 259H masing-masing, dan ladang sayur mereka ('ladang

sayur itu'). Tuanpunya berdaftar pegangan No 3532 ('Estet Thean Teik') merupakan pemegang amanah Khoo Kongsi. Keluarga datuk P2 ('Cheong') telah mengubahkan apa yang dahulunya merupakan sebidang tanah hutan yang berpaya kepada satu ladang yang produktif. Atas kematian Cheong, P2 telah mengambil alih pengurusan ladang yang dikerjakan oleh anggota-anggota keluarga itu. Rumah No 258K telah didirikan atas petak berkenaan sebelum Disember 1938 dan dalam tahun 1972, P1 dan P2 telah didaftarkan sebagai penyewa, menggantikan Cheong. Rumah No 259H telah didirikan oleh Cheong dalam tahun 1963 dengan persetujuan Khoo Kongsi dan telah didaftarkan dalam nama P2. Selepas kematian Cheong, P2 telah membelanjakan sebanyak RM1,500 untuk menyediakan sebuah bumbung untuk rumah tersebut. Tidak ada syarat yang telah dicetakkan di atas resit-resit sewa yang dikeluarkan kepada Cheong dan P2 sehingga akhir 1981. Syarat-syarat, dalam bahasa Inggeris, telah diindorskan pada resit-resit yang berhubung dengan ladang itu selepas tahun 1976 dan untuk kedua-dua rumah kediaman dalam tahun 1981. Plaintif adalah peladang yang buta huruf dan tidak memahami syarat-syarat tersebut yang termasuk satu syarat bahawa tempoh notis sebulan adalah mencukupi untuk menamatkan penyewaan itu. Dalam tahun 1972, P2 telah diberitahu oleh pemegang amanah melawat Khoo Kongsi bahawa beliau (P2) tidak perlu menukar nama penyewaan kepada namanya dan bahawa beliau boleh terus menanam sayur-sayuran untuk seberapa lama yang beliau inginkan selagi beliau membayar sewa. Cheong juga telah memberitahu P2 bahawa Khoo Kongsi telah menjamin kepadanya bahawa selagi beliau membayar sewa tanah, beliau boleh tinggal di situ dan mengerjakan ladang itu dan atas kematian beliau, penyewaan akan berterusan untuk faedah keluarganya, selagi keluarga beliau terus membayar sewa dan mengerjakan ladang itu. Selepas jaminan itu diberi oleh pemegang amanah melawat, plaintif telah melabur sebanyak RM12,000 untuk memasangkan satu system renjisan air (sprinkler system). Selama lebih 50 tahun, Khoo Kongsi atau orang lain tidak menggangu kegiatan perladangan keluarga plaintif. Gangguan hanya bermula setelah Khoo Kongsi mengikat suatu perjanjian usaha sama dengan defendan, lalu Khoo Kongsi telah memberi plaintif notis penamatan penyewaan selama satu bulan.

Plaintif-plaintif (P1, P2 dan P3) menuntut bahawa pada semua masa yang penting, mereka merupakan penyewa sah dan terlindung dan bahawa mereka berhak di sisi undang-undang dan ekuiti kepada milikan petak berkenaan. Tuntutan-tuntutan plaintif terhadap defendan berdasarkan pencerobohan dan kacau ganggu yang dikatakan dilakukan oleh defendan. Relif-relif yang dipohon oleh plaintif adalah untuk: (i) ganti rugi teruk dan ganti rugi teladan untuk pencerobohan dan kacau ganggu, bersama bunga ke atasnya; (ii) injunksi kekal menghalang kesemua defendan-defendan secara sendiri, atau melalui pengkhidmat dan/atau agen mereka atau secara lain, dari memasuki, mencerobohi dan/atau menjalankan kerja-kerja ke atas petak berkenaan; dan (iii) kos.

Defendan telah membangkitkan beberapa isu, termasuk beberapa isu permulaan, iaitu: (i) kesan pencantuman D3 dan D4 setelah writ dikeluarkan merupakan suatu percubaan untuk membangkitkan suatu kausa tindakan yang baru; (ii) plaintif tidak harus diberi kebenaran untuk meminda semula pernyataan tuntutan untuk memasuki suatu tuntutan untuk pencerobohan terhadap D3 dan D4; (iii) terdapat ketakpatuhan A 20 k 9 Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah itu'); (iv) tindakan ini adalah tidak betul kerana ketakcantuman dan ketiadaan locus standi; dan (v) tuntutan plaintif dihalang oleh res judicata dan estopel isu. Isu-isu substantif yang dibangkitkan adalah: (i) apakah keluasan petak berkenaan dan sama ada plaintif mempunyai milikan ke atas petak berkenaan, dua rumah kediaman itu dan ladang sayur itu; (ii) apakah notis penamatan yang perlu untuk menamatkan penyewaan plaintif ke atas ladang sayur dan dua rumah kediaman itu; (iii) sama ada, memandangkan bahawa penyewaan itu tidak didaftarkan dan berfungsi sebagai penyewaan bulanan, notis selama sebulan itu mencukupi untuk menamatkan penyewaan plaintif; (iv) sama ada penyerahan notis keluar itu adalah efektif; (v) sama ada rumah No 258K tertakluk kepada Akta Kawalan Penyewaan 1966; (vi) sama ada terdapat equiti ataupun estopel berasaskan equiti yang melindungi pendudukan plaintif atas petak berkenaan; (vii) sama ada terdapatnya ekuiti bergantung kepada terdapatnya pelaksanaan spesifik; (viii) sama ada penyewaan plaintif mengikat D1 dan/atau D3; (ix)sama ada satu estopel bersifat janji (promissory estopel) bangkit; (x) sama ada satu estopel keempunyaan bangkit dan takat ekuiti plaintif; dan (xi) sukatan gantirugi yang patut diawardkan.

Diputuskan, membenarkan tuntutan plaintif:

(1) Berdasarkan keterangan di hadapan mahkamah, adalah jelas bahawa kausa tindakan terhadap D3 dan D4 timbul daripada tindakan salah yang dikatakan telah dilakukan oleh mereka sebelum mereka dicantumkan sebagai defendan dan plaintif tidak memperkenalkan sebarang kausa tindakan yang baru. Semasa pendengaran permohonan untuk percantuman D3 dan D4, peguambela defendan tidak membangkitkan bantahan terhadapnya dan bantahan sekarang dibangkitkan pada peringkat yang sangat lewat, dan apabila sebarang kausa tindakan terhadap D3 dan D4 mungkin dihalang oleh had masa. Oleh itu, adalah tidak betul ataupun adil untuk melayan bantahan tersebut sekarang. Lagipun, jika bantahan dibuat pada pendengaran permohonan untuk kebenaran meminda, plaintif boleh mengeluarkan writ baru dengan menamakan D3 dan D4 sebagai defendan dan kemudiannya memohon supaya kedua–dua tindakan itu disatukan.

(2) Memandangkan kronologi kejadian-kejadian berkaitan dengan permohonan untuk meminda semula pernyataan tuntutan untuk menyertakan pencerobohan oleh D3 dan D4, dan oleh kerana

tiada bantahan terhadap permohonan tersebut, kebenaran itu telah diberi secara betul.

(3) Peguamcara plaintif telah memfailkan dengan sempurna pernyataan tuntutan yang dipinda semula itu di pejabat pendaftaran mahkamah dalam had masa yang ditetapkan untuk berbuat demikian, walaupun pejabat pendaftaran masih belum mengembalikan dokumen tersebut pada tarikh perbicaraan. Plaintif tidak boleh membuat apa-apa lagi dan kekurangan ketelitian yang timbul mesti dianggap berpunca daripada pejabat pendaftaran dan bukannya dari peguam plaintif. Tidak terdapat keingkaran A 20 K 9 Kaedah itu.

(4) Terma locus standi ataupun pendirian di mahkamah undang-undang bermakna hak untuk menuntut relief kehakiman selain daripada soalan-soalan berkenaan dengan merit substantif dan keupayaan undang-undang plaintif. Terdapat dua prinsip yang harus diingati: pertama, mahkamah terikat untuk bertindak atas dasar bahawa segala yang dinyatakan dalam pernyataan tuntutan dan dalam dokumen-dokumen yang disandarkan adalah benar; dan kedua, bidangkuasa untuk menampung sesuatu hujah ketiadaan locus standi hanya harus dilakukan di mana tiada kemungkinan keraguan. Bantahan terhadap ketakcantuman hanya dibuat pada peringkat yang lewat di dalam hujah-hujah peguambela defendan dan A 15 k 6(1) Kaedah itu menyatakan bahawa tindakan tidak harus digagalkan oleh ketidakcantuman sebarang pihak.

(5) Adalah benar bahawa jika beberapa orang adalah tuanpunya bersesama tanah atau premis yang dijejaskan oleh pencerobohan, sebagai peraturan am, mereka kesemuanya patut dicantumkan sebagai plaintif bersesama. Walau bagaimanapun, boleh disimpulkan daripada keterangan bahawa P2 adalah bagaikan seorang pemegang amanah konstruktif ladang sayur itu untuk faedahnya sendiri, faedah plaintif yang lain dan PW1 dan dengan demikian, P2 sendiri boleh membawa tindakan untuk melindungi harta amanah. Oleh itu, terdapat locus standi.

(6) Pemberian ladang sayur itu kepada plaintif and PW1 telah disempurnakan oleh milikan dan pengusaahaan mereka atas ladang sayur itu semasa dan selepas hayat Cheong, dan oleh itu Statute of Frauds 1677 tidak terpakai. Ini tidak merupakan suatu tindakan yang berasaskan kontrak penjualan atau sebarang pelupusan tanah, ataupun sebarang kepentingan dalam tanah.

(7) Pembubaran sesuatu sebarang injunksi interlokutori tidak merupakan res judicata atau estopel isu semasa memutuskan isu-isu secara muktamad. Kesan penolakan injunksi interlokutori dari segi undang-undang adalah semata-mata bahawa, pada peringkat interlokutori, berdasarkan material terhad yang ada pada masa itu, plaintif tidak layak untuk menerima relief injunktif yang dituntut.

(8) Keluasan tanah di bawah milikan plaintif adalah pada setiap masa yang penting kepada tindakan ini, 2.8 ekar atau lebih

kurang 121,619 kaki persegi.

(9) Sekeping resit dari segi undang-undang hanya merupakan bukti bahawa sejumlah wang telah dibayar; ia tidak merupakan kontrak ataupun mempunyai kesan sebagai satu estopel. Hasrat benar pihak-pihak mesti ditunjukkan melalui keterangan semasa pembicaraan. Tidak ada bukti yang menunjukkan bahawa syarat-syarat yang dinyatakan dalam resit-resit sewa berkenaan dengan ladang atau dua rumah kediaman itu telah diperkenalkan dari permulaan penyewaan dan juga tidak ada apa-apa yang menunjukkan bahawa plaintif atau nenek moyang mereka, yang tidak mempunyai sebarang pengetahuan bahasa Inggeris, boleh dikatakan telah menerima 'syarat-syarat' tersebut. Beban membukti bahawa syarat-syarat dalam resit mempunyai kuasa kontrak terletak pada defendan yang bergantung padanya dan bukan terletak pada plaintif untuk menunjukkan sebaliknya. Oleh itu, tidak ada sebarang inferens menentang boleh ditimbulkan terhadap plaintif disebabkan peninggalan ini. Hakikat bahawa plaintif sendiri telah menggunakan resit sewa yang mengandungi syarat tersebut sebagai keterangan tidak menghalang mereka daripada menegaskan pada penghujung pendengaran itu bahawa syarat itu tidak sah dari segi undang-undang. Syarat-syarat yang dinyatakan dalam resit sewa tersebut tidak mempunyai sebarang kesan undang-undang dan mesti diabaikan apabila menimbangkan soalan sama ada notis keluar itu mencukupi atau tidak.

(10) Manakala cara pembayaran sewa adalah satu faktor yang penting dalam memutuskan soalan sama ada tempoh sesuatu notis keluar adalah mencukupi, ianya bukan semestinya suatu faktor penentuan. Oleh itu, walaupun sewa dibayar setiap bulan, ini tidak semestinya bermakna bahawa penyewaan itu boleh ditamatkan dengan notis sebulan. Di mana tiada perjanjian penyewaan yang bertulis untuk mentafsirkan sifat penyewaan, faktor-faktor yang patut diambil kira termasuk bukan sahaja cara membayar sewa, tetapi juga kelakuan dan niat pihak-pihak, kegunaan yang dimaksudkan untuk perkara yang menjadi subjek penyewaan dan lain-lain keadaan relevan kes itu secara keseluruhan. Atas fakta-fakta yang berkenaan, notis selama tiga bulan adalah sesuai untuk penamatan penyewaan ladang sayur serta dua rumah kediaman itu kerana ini akan memberikan plaintif masa yang mencukupi untuk menuai tanamannya dan memberi milikan kosong petak berkenaan.

(11) Notis keluar diserahkan secara sah apabila ditinggalkan di premis berkenaan.

(12) Oleh kerana keperluan s 16(1) Akta Kawalan Penyewaan 1966 tidak dipenuhi, mahkamah tidak mempunyai bidangkuasa untuk membuat suatu perintah milikan memihak kepada defendan berkenaan dengan rumah No 258K.

(13) Atas keterangan, janji serta jaminan yang telah diberikan oleh Khoo Kongsi pada mulanya kepada Cheong bahawa selagi

beliau atau keluarganya terus membayar sewa tanah, beliau boleh tinggal dan mengerjakan ladang itu seberapa lama yang beliau inginkan dan berdasarkan ini, beliau dan keluarganya telah mengubahkan apa yang dahulunya tanah berpaya kepada satu ladang yang produktif. Beliau juga telah membina dua rumah kediaman itu dengan persetujuan Khoo Kongsi. Plaintif-plaintif telah melaburkan wang dan mengeluarkan belanja yang banyak berdasarkan jaminan tersebut. Atas keterangan ini, penyewaan yang dipegang oleh Cheong bukan hanya untuk faedah beliau tetapi juga untuk faedah keluarga beliau dan penyewaan tersebut bukan hanya penyewaan bulanan.

(14) Berkenaan dengan keterangan mengenai janji atau jaminan yang dibuat oleh pemegang amanah melawat, adalah mantap bahawa keterangan sedemikian bukanlah dengar cakap dan boleh diterima kerana ia digunakan untuk menunjukkan fakta bahawa kenyataan itu telah dibuat dan bukan kebenaran kenyataan itu. Kenyataan sedemikian selalunya relevan apabila mempertimbangkan keadaan mental dan kelakuan selanjutnya seseorang saksi. Keterangan mengenai kenyataan yang dibuat kepada P2 oleh Cheong atau jaminan yang dibuat oleh Khoo Kongsi telah dikemukakan untuk menunjukkan bahawa janji atau jaminan itu telah mendorong Cheong dan plaintif-plaintif untuk bertindak dalam cara yang memudaratkan mereka.

(15) Kenyataan yang merupakan pengakuan yang telah dibuat oleh seseorang yang bukan pihak kepada tindakan itu boleh diterima di bawah s 18(3) Akta Keterangan 1950.

(16) Doktrin 'holding out' yang kadangkalanya dipanggil kuasa zahir (apparent or ostensible authority) telah dikatakan berdasarkan estopel. Agensi secara estopel bangkit apabila seseorang membenarkan agen itu mengemukakan dirinya sebagai mempunyai kuasa, dan ini membuatkan seseorang lain mempercayai bahawa beliau telah memberikuasa kepada pihak ketiga untuk bertindak bagi pihaknya, dan orang yang lain itu kerana kepercayaan itu, telah mengadakan transaksi dengan pihak ketiga dalam lingkungan kuasa zahirnya. Beban terletak pada orang yang berurus dengan agen itu untuk menunjukkan kuasa yang sebenarnya atau yang zahir dan kelakuan yang dikatakan sebagai 'holding out' mesti dibuktikan secara afirmatif. Adalah merupakan suatu soalan fakta dalam setiap kes sama ada kuasa zahir wujud untuk sesuatu tindakan tertentu berkenaan dengan liabiliti yang ingin dikenakan ke atas prinsipal. Memandangkan keterangan yang wujud, plaintif telah berjaya membuktikan, atas imbangan kebarangkalian, bahawa pemegang amanah melawat telah dikemukakan sebagai mempunyai kuasa untuk berurus dengan penyewa bagi pihak Khoo Kongsi, termasuk kuasa untuk membuat janji dan jaminan tersebut, atas mana plaintif telah berharap dan menanggung perbelanjaan besar.

(17) Doktrin estopel bersifat janji membekalkan satu pembelaan kepada satu tindakan berdasarkan kontrak asal di mana defendan bergantung kepada variasi sukarela. Ia tidak membekalkan satu kausa tindakan untuk seseorang plaintif yang bergantung kepada janji yang percuma (gratuitous promise). Namun demikian, kesannya mungkin membolehkan satu pihak menguatkuasakan satu kausa tindakan, yang mana tanpa estopel, tidak akan wujud. Atas fakta-fakta kes ini, plaintif dan nenek-moyang mereka telah mempunyai milikan petak berkenaan selama berdekad-dekad dan mereka telah memulakan prosiding ini bersandarkan ekuiti atau estopel berdasarkan ekuiti. Tuntutan plaintif kepada ekuiti yang dikatakan wujud itu tidak bergantung kepada terdapatnya remedi pelaksanaan spesifik.

(18) Berikutan perjanjian usaha sama itu, D3 telah menjadi penyewa berdaftar Lot 3523 dan memegang sewaan itu sebagai pemegang amanah dan alter ego Khoo Kongsi. Ini bermakna bahawa D3 tidak berada dalam kedudukan yang lebih baik daripada Khoo Kongsi dalam menentang tuntutan plaintif bahawa mereka (plaintif) berhak memiliki petak berkenaan di sisi undang-undang dan ekuiti. Lagipun, sebagai waris hakmilik dengan notis (successors-in-title with notice) kepentingan plaintif di dalam petak berkenaan, D3 terpaksa mengambil penyewaannya tertakluk kepada kepentingan itu. Keesahan kontrak yang berkaitan dengan tanah atau sebarang kepentingan dalamnya adalah diisytiharkan di dalam s 206(3) Kanun Tanah Negara 1965 ('Kanun itu') dan tidak boleh disangkal. Oleh itu, mahkamah tidak bersetuju dengan hujah peguambela defendan bahawa perlindungan tidak boleh disangkal yang dijamin di bawah s 340(1) Kanun itu membolehkan D3 mengambil penyewaannya bebas dari kepentingan plaintif di dalam petak berkenaan.

(19) Estopel keempunyaan (proprietory estoppel) merupakan salah satu pengecualian kepada peraturan am bahawa seseorang yang membelanjakan wang untuk memperbaiki harta seseorang yang lain tidak mempunyai hak untuk menuntut pembayaran ganti atau sebarang kepentingan keempunyaan dalam harta itu. Tidak seperti estopel bersifat janji, estopel keempunyaan, di mana ianya beroperasi, adalah kekal dalam kesannya dan juga berupaya beroperasi secara positif untuk memberi satu kausa tindakan. Balasan yang bebas tidak merupakan satu keperluan yang penting untuk operasi estopel keempunyaan dan pembuat representasi itu tidak semestinya mengetahui bahawa hartanahnya sedang diperbaiki. Kelakuan pembuat representasi dan tindakan selanjutnya serta kepercayaan penerima representasi itu mungkin menyebabkannya tidak patut (unconscionable) bagi pembuat representasi untuk mendesak hak undang-undangnya secara tegas. Jika seseorang itu membina atau memperbaiki tanah kepunyaan seorang lain, masih akan timbul suatu ekuiti jika

tuanpunya tanah itu telah mendorong orang itu untuk menjangka bahawa dia boleh tinggal di sana.

(20) Prinsip-prinsip yang berkait guna dengan amanah konstruktif (constructive trusts) amat serupa dengan prinsip yang mendasari doktrin estopel keempunyaan. Dalam kedua-duanya, penuntut mesti bertindak mudaratkannya dirinya sendiri bersandar kepada kepercayaan bahawa beliau akan memperolehi sesuatu kepentingan, dan ekuiti bertindak ke atas kesedaran tuanpunya sah untuk menghalang beliau daripada menewaskan tujuan yang sesama. Dalam kes-kes tertentu, seperti yang ini, estopel keempunyaan adalah salah satu jenis amanah konstruktif.

(21) Seorang yang mengeluarkan perbelanjaan atau melakukan pembaikan ke atas hartanah seorang lain patut dilindungi daripada gangguan selagi beliau akan dimudaratkan. Memandangkan fakta bahawa plaintif dan nenek-moyang mereka telah menduduki petak berkenaan, mengerjakan ladang sayur itu dan jumlah wang yang banyak yang tentu sudah berakru kepada mereka dan nenek-moyang mereka dalam bentuk keuntungan selama tempoh beberapa dekad, dan fakta lanjutan bahawa mereka telah menikmati pendiaman tanpa sewa dalam dekad yang lalu, plaintif telah memperolehi kepuasan yang mencukupi untuk kerja dan perbelanjaan mereka atas petak berkenaan, ataupun dalam kata lain, mudarat yang dialami oleh mereka telah dipuaskan sepenuhnya, dan oleh itu, mereka tidak layak mendapat sebarang relif.

(22) Defendan telah melakukan tindakan pencerobohan dan kacau ganggu ke atas tanah plaintif, atas mana mereka (plaintif) mempunyai milikan yang sah.

(23) Peraturan am mengenai sukatan gantirugi adalah jumlah wang yang akan meletakkan pihak yang telah dicedera atau disusahkan, dalam kedudukan seperti yang beliau akan berada sekiranya beliau tidak menanggung kesalahan untuk mana beliau kini menerima pampasan atau ganti rugi. Apabila seorang plaintif menuntut ganti rugi daripada seseorang defendan, beliau harus menunjukkan bahawa kehilangan berkenaan, untuk mana beliau menuntut ganti rugi, telah disebabkan oleh kesalahan defendan dan juga bahawa ganti rugi itu tidak terlalu di luar dugaan untuk didapati. Di mana keterangan yang tepat boleh didapati, mahkamah dengan wajarnya akan menjangka mendapatnya, tetapi di mana ianya tidak boleh didapati, mahkamah mesti bertindak sedapat mungkin.

(24) Cara biasa untuk membuktikan nilai pasaran dalam sesuatu kes jualan semula barang-barang secara pukal adalah dengan memanggil pelanggan-pelanggan atau sekurang-kurangnya, di mana pihak-pihak bersetuju dengan keterangan dokumentari, untuk mengemukakan dokumen-dokumen yang menunjukkan kewujudan serta pengurusan dengan pelanggan-pelanggan. Ketegasan plaintif yang tidak disokong bahawa beliau boleh

mendapat sekian sekian harga untuk buah-buahan atau sayur-sayurannya, tidak membuktikan harga pasaran, apa lagi bahawa beliau mempunyai pasaran. Jika ini dibenarkan, keperluan membukti kuantum akan diketepikan sama sekali.

(25) Ganti rugi teladan hanya boleh diberi dalam tiga kategori kes, iaitu, tindakan menindas oleh pegawai-pegawai kerajaan; keduanya, kes-kes di mana seorang defendan melalui pengabaian yang sinis terhadap hak-hak plaintif, telah mengira bahawa wang yang boleh diperolehinya melalui kesalahan beliau akan melampaui risiko ganti rugi; dan ketiganya, di mana statut dengan nyata membenarkannya.

(26) Pencerobohan biasanya dikaitkan dengan tindakan yang sengaja walaupun telah dilakukan secara silap, kerana kesilapan tidak merupakan suatu pembelaan dan bukanlah jawapan kepada tuntutan untuk mendapat ganti rugi teladan, memandangkan keadaan-keadaan tertentu kes ini.

(27) Award ganti rugi teladan patutlah sederhana dan sumber pendapatan pihak adalah satu pertimbangan yang relevan. Faktor lain yang patut dipertimbangkan adalah kuantum award pampasan serta tingkah laku pihak sehingga masa penghakiman. Sebarang jumlah yang diberi oleh mahkamah sebagai ganti rugi teladan untuk tindakan pencerobohan mestilah mencerminkan betapa seriusnya kesalahan itu.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02–176–93.]

Notes

For cases on amendment of pleadings, see 2 *Mallal's Digest* (4th Ed) paras 131–136 and 1696.

For cases on estoppel, see 2 *Mallal's Digest* (4th Ed) para 869; 3 *Mallal's Digest* (4th Ed) paras 993 and 1537; 9 *Mallal's Digest* (4th Ed) paras 924, 962–970, 972, 975 and 1176.

For cases on recovery of possession of controlled premises, see 9 *Mallal's Digest* (4th Ed) paras 115–117, 267–628.

For cases on sufficiency of notices to determine tenancies, see 8 *Mallal's Digest* (4th Ed) para 1488; 9 *Mallal's Digest* (4th Ed) paras 813, 870–877, 900, 906, 909–911 and 913.

For cases on damages for trespass to land, see 8 *Mallal's Digest* (4th Ed) para 2136; 9 *Mallal's Digest* (4th Ed) paras 820, 925–929; 12 *Mallal's Digest* (4th Ed) para 677.

For cases on the validity of service of notices of termination, see 9 *Mallal's Digest* (4th Ed) paras 889–894.

For cases on assignments of tenancies, see 9 *Mallal's Digest* (4th Ed) paras 943 and 945.

For cases on the effect of non-registration of tenancies, see 8 *Mallal's Digest* (4th Ed) paras 1464–1478; 9 *Mallal's Digest* (4th Ed) paras 971, 978, 1025–1031, 1033–1037.

For a case on the terms of a tenancy, see 9 *Mallal's Digest* (4th Ed) para 1272.
For cases on adverse inference, see 7 *Mallal's Digest* (4th Ed) paras 66–72.
For cases on the burden of proof for allegations of fact, see 7 *Mallal's Digest* (4th Ed) paras 142–143.
For a case on the measure of damages, see 3 *Mallal's Digest* (4th Ed) para 1045.

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1 *Chuan Chow Maritime SA Panama v K/S A/S Bulk Sea Transport The Times*, 25 February 1984 (refd)
2 *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 (refd)
3 *Drane v Evangelou & Ors* [1978] 2 All ER 437; [1978] 1 WLR 499 (refd)
4 *Hayes v Bristol Plant Hire Ltd & Ors* [1957] 1 All ER 685; [1957] 1 WLR 499 (folld)
5 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 (refd)
6 *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 1 All ER 843; [1955] 2 QB 584; [1955] 2 WLR 919 (refd)
7 *Kok Ek Chooi v Cheah Soon Neoh & Anor* [1982] 1 MLJ 219 (refd)
8 *VM Peer Mohamed v Great Eastern Life Assurance Co Ltd* [1982] 2 MLJ 298 (refd)
9 *Strong v Bird* (1874) LR 18 Eq 315 (refd)
10 *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611 (folld)
11 *Cheng Hang Guan & Ors v Perumahan Farlim (Pg) Sdn Bhd & Anor* [1983] 1 MLJ 348 (refd)
12 *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 (distd)
13 *Mohd Ismail v Lim Sok Cheng* [1988] 1 CLJ 335 (refd)
14 *Lee v Lancashire Yorkshire Railway Co* (1871) LR 6 Ch App 534 (folld)
15 *Hockle v London County Council* (1910) 26 TLR 580 (folld)
16 *Oliver v Nautilus Steam Shipping Co Ltd* [1903] 2 KB 639 (folld)
17 *Loke Yung Hong v Shanghai Furniture Co & Anor* [1948] MLJ 136 (refd)
18 *Balwant Singh v Tong Lam & Co* [1963] MLJ 33 (folld)
19 *Lee Ah Low v Cheong Lep Keen* [1970] 1 MLJ 7 (distd)
20 *Syed Mohd Alsagoff v Max Behr* [1883] 1 Kyshe 637 (refd)
21 *Tay Boon Huat v Kulsam Bee* [1914] SSLR 51 (refd)
22 *ALMM Muthukaruppan Chettiar v Haji Ibrahim* [1941] MLJ 150 (refd)
23 *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 (refd)
24 *Adler v Blackman* [1953] 1 QB 146; [1952] 2 TLR 809; [1952] 2 All ER 945 (folld)

25 *Doe d Martin v Watts* (1789) 7 TR 83 (refd)
26 *Lim Kien Mok v BH Kevan* [1963] MLJ 284 (folld)
27 *Teck Seng & Co v William Eu Keng Yuet* [1980] 2 MLJ 115 (refd)
28 *Lai Seng Fook v Tang Kong Low* [1978] 1 MLJ 158 (refd)
29 *Mok Deng Chee v Yap See Hoi* [1981] 2 MLJ 321 (not folld)
30 *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 (not folld)
31 *Nair v Chidambaram* [1961] MLJ 264 (folld)
32 *Subramaniam v PP* [1956] MLJ 220 (folld)
33 *Rama Corp Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147 (folld)
34 *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; [1964] 2 WLR 618; [1964] 1 All ER 630 (folld)
35 *Re Henry Bentley & Co and Yorkshire Breweries Ltd, ex p Harrison* (1893) 69 LT 204 (folld)
36 *Council of the Shire of Ashford v Dependable Motors Pty Ltd* [1961] AC 336; [1960] 3 WLR 999; [1961] 1 All ER 96 (folld)
37 *Pole v Leask* (1863) 33 LJ Ch 155 (folld)
38 *Bailey & Whites Ltd v House* (1915) 31 TLR 583 (folld)
39 *Brazier v Camp* (1894) 63 LJQB 257 (folld)
40 *Crabb v Arun District Council* [1975] 3 All ER 865; [1976] Ch 179; [1975] 3 WLR 847 (folld)
41 *Karuppan Chetty v Suan Thian* [1916] 1 FMSLR 300 (folld)
42 *Prudential Assurance Co Ltd v London Residuary Body & Ors* [1992] 3 WLR 279 (folld)
43 *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133; [1973] AC 836 (refd)
44 *Central London Property Trust v High Trees House Ltd* [1947] KB 130; [1956] 1 All ER 256; [[1947] LJR 77; 175 LT 333; 62 TLR 557 (refd)
45 *Evenden v Guildford City Association Football Club Ltd* [1975] QB 917; [1975] 3 WLR 251; [1975] 3 All ER 269 (refd)
46 *Combe v Combe* [1951] 2 KB 215; [1951] 1 All ER 767; [1951] 1 TLR 811 (folld)
47 *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (refd)
48 *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326; [1964] 3 All ER 556 (refd)
49 *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839; [1968] 3 WLR 225; [1968] 2 All ER 987 (refd)
50 *Errington v Errington and Woods* [1952] 1 KB 290; [1952] 1 All ER 149 (refd)
51 *Ashburn Anstalt v Arnold* [1988] 2 All ER 147; [1988] Ch 1 (refd)
52 *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953; [1982] 1 WLR 1044 (refd)
53 *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23 (refd)
54 *Devi v Francis* [1969] 2 MLJ 169 (folld)
55 *Ahmad Yar Khan v Secretary of State for India in Council* (1901) LR 28 Ind App 211 (folld)

56 *Denny v Jensen* (1977) 1 NZLR 635 (folld)
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58 *Brinnard v Ewens* [1987] Ch 2 EGLR 67; (1987) 19 HLR 415; (1987) 284 EG 1052 (refd)
59 *Inwards v Baker* [1965] 2 QB 29; [1965] 2 WLR 212; [1965] 1 All ER 446 (folld)
60 *AG of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114; [1987] 2 WLR 343; [1987] 2 All ER 387 (folld)
61 *Haslemere Estates Ltd v Baker* [1982] 1 WLR 1109; [1982] 3 All ER 525 (folld)
62 *Dann v Spurier* (1802) 7 Ves 231 (folld)
63 *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86 (refd)
64 *Taylor Fashions Ltd v Liverpool Victoria Trustees Co* [1981] 1 All ER 897; [1981] QB 133; [1981] 2 WLR 576 (folld)
65 *Shaw v Applegate* [1977] 1 WLR 970; [1978] 1 All ER 123 (refd)
66 *Grant v Edwards* (1986) Ch 638; [1986] 3 WLR 114; [1986] 2 All ER 426 (refd)
67 *Gillies v Keogh* (1989) 21 NZLR 327 (refd)
68 *Lloyds Bank Plc v Rosset* [1990] 2 WLR 867; [1991] 1 AC 107 (refd)
69 *Maharaj v Chand* [1986] AC 898 (folld)
70 *Re Basham (decd)* [1986] 1 WLR 1498; [1987] 1 All ER 405 (folld)
71 *Griffiths v Williams* (1977) 248 EG 947 (refd)
72 *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 (refd)
73 *Dodsworth v Dodsworth* (1973) 228 EG 1115 (refd)
74 *Plimmer v Wellington Corporation* (1884) 9 App Cas 699 (refd)
75 *ER Ives Investment Ltd v High* [1967] 2 QB 379; [1967] 2 WLR 789; [1967] 1 All ER 504 (refd)
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78 *Neesom v Clarkson* (1845) 4 Hare 97 (refd)
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81 *Ward v Kirkland* [1967] Ch 194; [1966] 1 WLR 601; [1966] 1 All ER 609 (distd)
82 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (folld)
83 *Munnelly v Calco* [1978] IR 387 (refd)
84 *Bonham-Carter v Hyde Park Hotel Ltd* (1984) 64 TLR 177 (folld)
85 *Biggin & Co v Permanite* [1951] 1 KB 422; [1950] 2 All ER 859 (folld)
86 *Aerial Advertising Co v Batchelors Peas (Manchester)* [1938] 2 All ER 788 (folld)
87 *Ashcroft v Curtin* [1971] 1 WLR 1731; [1971] 3 All ER 1208 (folld)
88 *Rookes v Barnard* [1964] AC 1129; [1964] 2 WLR 269; [1964] 1 All ER 367 (folld)
89 *Cassell & Co Ltd v Broome* [1972] 1 All ER 801; [1972] AC 1027; [1972] 2 WLR 645 (refd)

A 90 *Basely v Clarkson* 83 ER 565 (refd)
91 *Praed v Graham* (1889) 24 QBD 53 (refd)

Legislation referred to
Rules of the High Court 1980 O 15 r 6(1)
B Evidence Act 1950 s 18(3)(a), (b)

Mohideen Abdul Kader (*Meenakshi Raman* with him) (*Meena, Thayalan & Partners*) for the plaintiffs.
RR Sethu (*Rajasingam* with him) (*RR Sethu*) for the defendants.

C **Edgar Joseph Jr SCJ**: Broadly stated, in this suit the plaintiffs claimed that at all material times, they were and are lawful and protected tenants and that they are entitled in law and equity to possession of that portion of the land forming part of the holding No 3532, Mukim 13, NED, Penang, Lot 2497, Mukim 13, NED, Penang, in area 121,619sq ft (or 2.8 acres) delienated in the plan P16 ('the plot concerned') on which are situated their
D two dwelling houses, bearing numbers 258K and 259H ('the two dwelling houses') and their vegetable farm ('the farm').

At all material times to this suit, the registered proprietors of holding No 3532 (popularly known as 'Thean Teik Estate') were and are the trustees of the Khoo Kongsi.

E More particularly, the plaintiffs' claim against the defendants is founded on trespass and nuisance, allegedly committed by the first defendant, Perumahan Farlim (Penang) Sdn Bhd, and by their servants or agents, the second defendant, Sriwata Sdn Bhd, as developers and contractors, respectively, on 18 June 1982 on a portion of the plot concerned etched in black on the plan P14, and by the third defendant, Perumahan Farlim
F (Malaysia) Sdn Bhd, and their servants or agents, the fourth defendant, Thean Tatt Construction Sdn Bhd, as developers and contractors respectively, on 17 March 1988, on a portion of the plot concerned etched in orange on the plan P14 and their unlawful occupation of the portion etched in black in exh P14.

G The reliefs prayed for by the plaintiffs are for aggravated and exemplary damages for trespass and nuisance, with interest thereon, a permanent injunction restraining all the defendants whether by themselves or their servants and/or agents or otherwise howsoever from entering, trespassing and/or carrying out works on the plot concerned on which are situated the dwelling houses and the vegetable farm, and costs.

H On the other hand, broadly stated, the defence has raised objections based on points of procedure relating to amendments of pleadings, the law as to locus standi and, so far as the merits are concerned, the defence denies the averments aforesaid by the plaintiffs and counterclaims for possession, damages and mesne profits.

I In this judgment, unless the context otherwise requires, I shall refer to the first, the second, and the third plaintiffs as P1, P2 and P3, respectively, and to the first, the second, the third and the fourth defendants as D1, D2, D3 and D4, respectively.

The essential facts said to underlie the plaintiffs' case may be conveniently taken from the written submission of counsel for the plaintiffs and are as follows:

1.11 The plaintiffs' family has been staying on the plot concerned since the time of P2's great-grandfather, which would be in the later part of the 19th century or early part of the 20th century, ie more than 100 years ago. P2's grandfather, Cheong Au Pit, was 84 years of age at the time of his death in 1969.

1.12 Cheong Au Pit's family, by their own efforts, had converted what was once a swampy jungle land into a productive farm. They levelled the land and constructed drains to drain away the water. They had also built pigsties, chicken coops, wells and other structures.

1.13 Cheong Au Pit, who managed the farm during his lifetime, was the head of an extended Chinese family, consisting of his children, grandchildren, sons-in-law, daughters-in-law and his adopted daughter Cheng Lye Hiang (PW1). After Cheong Au Pit's death, P2 took over the role of Cheong Au Pit and managed the farm.

The family members worked on the farm and the income was used to pay for their expenses, while the balance was shared among the family members who worked on the farm.

1.14 House No 258K, has been standing on the plot concerned since before the birth of P2 on 15 December 1938. In 1972, after Cheong Au Pit's death, P1 and P2 were registered as tenants of this house in place of Cheong Au Pit.

House No 259H was built by Cheong Au Pit in 1963 with the consent of the Khoo Kongsi and registered in the name of P2. After Cheong Au Pit's death, P2 spent RM1,500 in providing a ceiling for the house.

1.15 Separate rent receipts were issued in respect of the two dwelling houses and the vegetable plot standing on the plot concerned. No conditions were printed on the rent receipts issued to Cheong Au Pit and P2 until late 1981.

There is no record of any decision by the board of trustees of the Khoo Kongsi on the alleged conditions of the tenancy of the vegetable plot. Conditions were endorsed on the receipts for vegetable lands only after 1976 because the Khoo Kongsi had, by then, entered into a joint-venture agreement to develop a portion of Thean Teik Estate, but on the receipts issued to P2, the conditions were endorsed only in 1981.

1.16 Some time in 1972, the visiting trustee of the Khoo Kongsi had told P2 that it was not necessary to change the tenancy of the vegetable plot to her name and that she could continue planting vegetables as long as she wished, provided she paid the rent.

Cheong Au Pit had also told P2 that Khoo Kongsi had assured him that so long as he continued to pay ground rent, he could stay and cultivate the vegetable plot for as long as he wanted.

Upon the death of a tenant of a vegetable plot, his tenancy continued for the benefit of his family. So long as his family members continued to pay the rent, they could continue farming.

1.17 After the assurance given by the visiting trustee, the plaintiffs invested RM12,000 in installing a sprinkler system.

1.18 P2's testimony regarding the assurance given to her by the visiting trustee in 1972 was corroborated by the testimony of a trustee of the Khoo Kongsi, Khoo Kah Seng (DW3), who testified:

Q: When a tenant of vegetable farm dies, what does the Khoo Kongsi do?
A: The tenancy still continues for the benefit of the family of the deceased.
Q: So long as they continue to pay rents, they can continue farming?
A: Yes.

Thus, the assurance given to P2 is consistent with the practice of the Khoo Kongsi before the developers, Farlim, came on the scene in the late 70s. DW3's evidence also shows that the tenancy was for the benefit of the family and not just the person registered as tenant. The trustees of the Khoo Kongsi must have been fully aware of the social and cultural context on which their legal relationship with Cheong Au Pit was based. They must have known that Cheong Au Pit was the head of an extended Chinese family and that farming activities were by and for the benefit of this extended family.

1.19 For more than 50 years, neither the Khoo Kongsi nor anyone else had interfered with the farming activities of the plaintiffs' family. Only after the Khoo Kongsi had entered into a joint-venture agreement was there any interference with the plaintiffs' possession of the plot concerned.

As for the facts said to underlie the defendants' case, these can, for the sake of brevity and convenience, be dealt with when the substantive issues fall to be considered.

Before embarking upon a consideration of the issues, both of fact and law, which arise upon the merits, I must direct my attention to a number of objections based upon points of law and procedure advanced by counsel for the defendants.

What was the effect of the joinder of D3 and D4 after the issue of the writ?

The point taken by counsel for the defendants was that a plaintiff cannot, by an amendment, introduce a cause of action which arose after the issue of the writ. (See *Odger's Principles of Pleading & Practice* (22nd Ed) at pp 162-163.) This was because any amendment relates back to the date of the writ and therefore, any amendment to include a subsequent cause of action cannot relate back. (See 1 *The Supreme Court Practice 1991* at p 363.) The case of *Chuan Chow Maritime SA Panama v K/S A/S Bulk Sea Transport,*[1] was cited for the proposition that any inclusion of the subsequent cause of action required the consent of the defendant. Without such consent, an amendment to include a subsequent cause of action cannot be allowed.

When the application for joinder by summons-in-chambers (encl 62) was made by the plaintiffs, to add D3 and D4, on the ground that it was they, and not D1 and D2, who, as developers and contractors, were working

on the plot concerned at the material time, that is to say, on 18 March 1988, counsel for D1 and D2 did not object and an order was made accordingly.

It was because of this that I had, at the outset of the application to discharge the ex parte interlocutory injunction restraining D1 and D2, their servants or agents as developers and contractors, from entering the plot concerned, substituted D3 and D4 for D1 and D2, respectively, in the order granting the interlocutory injunction, though only after I had given counsel on both sides the opportunity of being heard on the point. All that counsel for the defendants then said was, 'The third and fourth defendants have complied with the order', which I took to be an unqualified admission that it was D3 and D4, their servants or agents, who were working on the plot concerned at the material time.

There is another matter I must refer to. Some three days before, I gave my judgment (reported as *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors*[2]) dismissing the application for discharge of the interlocutory injunction, I had enquired from counsel for the defendants when was it that D3 and D4 had replaced D1 and D2 as developers and contractors, respectively, as had been contended by counsel for the plaintiffs. Counsel for the defendants replied that they required the case to be stood down to seek instructions. Upon resumption, the court was informed by Mr Yeoh, counsel for the defendants, that, 'the third defendants took over the rights and liabilities of the first defendant with effect from April 1982. The third defendants have been registered lessees since August 1983. The second and fourth defendants were appointed earth contractors and they remain so up to today. The second defendants were appointed by the first defendants in December 1981. The fourth defendants were appointed in April 1982.' Whereupon counsel for the plaintiffs enquired as to 'who was working on the plaintiffs' plot at the time of the alleged wrongful acts complained about and which occurred on 18 March 1988'. In answer, counsel for the defendants replied that it was 'the third and fourth defendants who were working there then'.

Based upon the material aforesaid, it is obvious that the cause of action against D3 and D4 arose from the alleged wrongful acts committed by them on 17 March 1988, that is to say, before they were joined as defendants pursuant to the order of court dated 21 March 1988, and so the plaintiffs were not introducing a fresh cause of action against D1 and D2. It is not surprising, therefore, that when application had been made to join D3 and D4 as defendants and the consequential amendments made to the amended statement of claim, counsel for the defendants raised no objection thereto.

But, if counsel for the defendants is correct in his contention, and objection had been taken in limine, that is to say, on the hearing of the application for leave to amend, as undoubtedly it should have been, and the objection upheld, the plaintiffs could have issued a fresh writ citing D3 and D4 as defendants and then applied for consolidation of the two actions. This, however, was not done but, instead, counsel for the defendants raised no objection to the application for leave to amend by joining D3 and D4 as co-defendants. The question therefore arises whether, assuming counsel for the defendants is correct in his contention that the joinder of D3 and D4

A was legally impermissible, the objection should be entertained at all, at this very late stage, when perhaps, any cause of action the plaintiffs might have against D3 and D4 would be barred by limitation. Clearly, it would be neither right nor fair to entertain the objection now, and so I must rule that assuming there was an irregularity in the order for the joinder of D3 and
B D4, the same had been waived by reason of counsel for the defendants having raised no objection on the hearing of the application for leave to amend.

The first preliminary objection is accordingly overruled.

Was the order for re-amendment of the summons-in-chambers dated 21 August 1991
C *valid?*

The second preliminary objection taken by counsel for the defendants was that the re-amendment of the statement of claim to raise the alleged trespass on 21 August 1988 ought not to have been allowed for the same reasons as had been advanced in support of the first preliminary objection.
D In reply, counsel for the plaintiffs contended that the conduct of the defendants right up to the time of judgment was relevant to the question whether exemplary damages ought to be awarded and, in support, the case of *Drane v Evangelou & Ors*[3] (where non-compliance with an injunction was taken into account in awarding exemplary damages) was cited.

I also note that the statement of claim as amended, did distinguish
E between the conduct of D1 and D2 on 18 June 1982, which, it was said, constituted a trespass and resulted in loss to the plaintiffs, and the conduct of D3 and D4 on 17 March 1988, which it was said also constituted a trespass and resulted in loss to the plaintiffs.

My attention was also drawn to the following timetable of events:

F 1.4 The cause of action against D3 and D4 were included in the statement of claim with the consent of the solicitors of all the defendants. The sequence of events relating to this was as follows:

(a) On 21 March 1988, by a summon-in-chambers dated the same day (encl 62), the plaintiffs had applied: (i) to add D3 and D4 as
G parties; and (ii) for an order that the plaintiffs be at liberty to amend the writ and the statement of claim to include D3 and D4.

(b) There being no objection to the application by the solicitors for the defendants represented by their counsel Mr Yeoh Jin Aik and Mr R Rajasingam, an order in terms of the application was granted and the matter proceeded as if the amendments had been effected.
H

(c) Pursuant to this order, the solicitors for the plaintiffs then proceeded to make amendments to the writ and statement of claim on 25 March 1988. This amended writ and statement of claim, marked as encl 73, was reissued by the High Court registry but, only on 11 February 1989.

I (d) The amended writ and statement of claim was then served on the solicitors for the defendants on 13 February 1989.

(e) When the defendant's solicitors did not file their defence, the solicitors for the plaintiffs, by a letter dated 6 April 1989, asked them to file their defence within 48 hours.

(f) By a letter dated 8 April 1989, the defendants' solicitors replied that they did not recall any application having been made for the amendments in the terms set out in the amended statement of claim.

(g) Consequently, the solicitors for the plaintiffs made an application by a summons-in-chambers dated 26 May 1989 (encl 76) for the statement of claim to be amended accordingly.

(h) The application was heard on 21 August 1989, and was not opposed by the solicitors for the defendants.

(i) Consequently, the amended writ and statement of claim was issued out of this court on 23 August 1989 (encl 78) and served on the defendants' solicitors on 30 August 1989 and the matter proceeded to trial.

In the circumstances, I consider that leave to amend was quite properly given and so the second objection is overruled.

If the order dated 21 August 1991 giving the plaintiffs leave to re-amend the summons-in-chambers was valid, were the requirements of O 20 r 9 of the Rules of the High Court 1980 with regard thereto complied with?

It was further argued by way of alternative — and this was the third objection — that the order granting leave to amend by adding D3 and D4 as defendants, with consequential amendments to the amended statement of claim (to raise the alleged trespass by D3 and D4 on 21 August 1988), was granted on 21 August 1991 but the requirements of O 20 r 9 of the Rules of the High Court 1980 ('the RHC') for the implementation of the order had not been complied with within the 14-day period stipulated therein, with the result that the order had lapsed and so the re-amended defence and counterclaim issued by the court on 23 August 1989 and served upon the solicitors for the defendants on 30 August 1989 should be ignored.

In reply, counsel for the plaintiffs had drawn my attention to these facts:

Leave to re-amend the amended statement of claim was granted by the court on 21 August 1991 so as to allow the plaintiffs to raise the allegation of trespass by D3 and D4 on 21 August 1988, and the re-amended statement of claim had been filed in the registry of this court on 29 August 1991, that is to say, well within the time limited for doing so, the trial duly proceeded on the basis that the amended statement of claim had been duly amended but the registry had yet to return the re-amended statement of claim with the required endorsement of the senior assistant registrar thereon. The solicitors for the plaintiffs did, however, serve upon the solicitors for the defendants, an unindorsed copy of the re-amended statement of claim on 29 August 1991. Clearly, the plaintiffs could not have done anything more and such lack of diligence as there was, must be ascribed to the registry and not the plaintiff's solicitors and so I do not consider that there has been any breach of O 20 r 9 of the RHC.

Accordingly, the alternative objection raised to the joinder of D3 and D4 is also overruled.

The locus standi points

It was contended by counsel for the defendants that, upon the evidence led by the plaintiffs, the suit was bad for non-joinder; in that Cheng Lye Hiang (PW1) ought to have been joined as a plaintiff. In particular, it was contended that since this was a joint claim for loss allegedly caused to joint property in which it was said that P1, P3 and PW1 had a vested interest, no award could be made by the court in respect of the claim for losses sustained as a result of the events of 1988 without joining all three of them as co-plaintiffs.

The term locus standi or standing in a court of law means entitlement to judicial relief apart from questions of the substantive merits and the legal capacity of a plaintiff.

In considering the locus standi objection, there are two principles I have to keep in the forefront of my mind. First, I am bound to proceed on the basis that everything alleged in the statement of claim and in the documents relied upon by the plaintiffs is true. Secondly, the jurisdiction to uphold a plea of no locus standi should only be exercised very carefully in circumstances where there is no possibility of doubt.

The authority which I should like to cite in support of the two principles aforesaid is the case of *Hayes v Bristol Plant Hire Ltd & Ors*,[4] an action by the director of a company for a declaration that he had been wrongfully excluded from the board, and where a preliminary point had been taken that the action was misconceived so that the court had no jurisdiction to entertain it further. The following passages in the judgment of Wynn-Parry J would appear to be in point:

> ... I am bound to proceed on the basis that every statement in the statement of claim and every assertion in the documents therein referred to are true ... (at p 686E).
>
> Now again I pause to remind myself that I am dealing with a preliminary point going to jurisdiction. It is open to the court to stop an action such as this in limine if, on a point being properly taken, it thinks right to do so, and generally speaking, if a point as to jurisdiction is taken, it is the duty of a court to bring the proceedings to as early an end as possible. At the same time, it is quite clearly established that it is a jurisdiction which should only be used very carefully and in circumstances where there is no possibility of doubt as to the lack of jurisdiction (at p 688E–F).

It is with the above principles in mind that I ask myself the question: 'Was the non-joinder of PW1 as a co-plaintiff fatal to the plaintiffs' claim?'

It is true that if several persons are joint owners of any land or premises affected by trespass, they should all, as a rule, be joined as co-plaintiffs, in the action.

But, in the present case, no objection was taken to the non-joinder of PW1 at the trial and it was only at a very late stage that counsel for the defendants had in his final written submission taken the point. Order 15 r 6(1) [of the RHC] provides that 'no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the court may in any cause or matter determine the issues and questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or

matter'. It is true to say, however, that this rule does not alter the legal principles with regard to actions, and it is still necessary to have before the court the proper parties necessary for determining the point at issue. (See, eg *Performing Right Society Ltd v London Theatre of Varieties Ltd*;[5] *Walter & Sullivan Ltd v J Murphy & Sons Ltd.*[6])

Now, according to the evidence adduced on behalf of the plaintiffs, at all material times:

(a) after the death of Cheong Au Pit, the plaintiffs and PW1 continued to live on the farm, to cultivate vegetables and to rear livestock thereon and to enjoy the income as aforesaid; and
(b) during the lifetime of Cheong Au Pit, the plaintiffs and PW1 jointly worked on the farm, the income derived therefrom being divided amongst themselves.

If true, it could be reasonably inferred from the evidence aforesaid, that P2, who had been paying the rent and managing the farm for the plaintiffs and PW1, was in the position of a constructive trustee of the farm for the benefit of herself, the other plaintiffs and of PW1. Consequently, P2 alone could maintain the suit to protect trust property and recover damages and obtain other reliefs in respect of injury done to trust property.

I would therefore dismiss this branch of the locus standi objection.

Another branch of the locus standi objections was that the plaintiffs have no title to the plot concerned and so could not maintain this suit.

The submissions advanced by counsel for the defendants in support of this plea may conveniently be taken from his written submission and are as follows:

6.1 It is not in dispute that:

(a) Cheong Au Pit died intestate in 1969; and
(b) the tenancy of the vegetable farm was not transferred to P1 and P2, unlike the dwelling house No 258K.

6.2 It is however alleged that Cheong Au Pit, just before he died, made a gift of the vegetable farm to P1, P2, P3 and PW1 orally. The further and better particulars alleges that the plot concerned 'was transferred' (see p 31 of exh BP). P2 did not testify to this fact. If a party does not testify to it, then ordinarily the court should ignore it. It is for a party to allege and prove its claim: secundum allegata ad probata.

6.3 It was PW1 who said so — see her evidence on 20 August 1991 (in the morning). She was cross-examined: house No 258K given to P1 and P2 only but the vegetable plot was given to four persons, P1, P2, P3 and PW1. Before his death, no steps taken to effect the gift (see her evidence on 24 August 1991 in the morning). There is nothing to show that the Khoo Kongsi were aware of the death of Cheong Au Pit until September 1972 when a written request was made to transfer dwelling house No 258K (see exh AB2 at p 99).

6.4 We submit that the alleged gift was invalid and ineffective because:

(a) it was a gift which involved the gift of an interest in land and, as such required writing, as the law then stood in Penang; the Statute

of Frauds applied in Penang until the application of the Contracts Act 1950 to Penang on 1 June 1974.
See Arulanandom J's judgment that the Statute of Frauds applied in Penang; *Kok Ek Chooi v Cheah Soon Neoh & Anor*;[7]

(b) even if the transaction were one of assignment, the lack of writing rendered the assignment invalid; s 4(3) of the Civil Law act 1956 requires writing; see also the position that prevails in Singapore where an assignment of a tenancy was held to require a deed: *VM Peer Mohamed v Great Eastern Life Assurance Co Ltd*,[8] which was approved by the Privy Council ([1985] 1 MLJ 329 at p 332, per Lord Templeman);

(c) equity would not perfect an imperfect gift: the rule in *Strong v Bird*,[9] as to which see Snell, *Equity* (29th Ed, 1990) at pp 124-25. None of the conditions to make an imperfect gift effective exists in this case; and

(d) the property would still remain in the estate of Cheong Au Pit and in the absence of letters of administration, the present plaintiffs would have no standing to maintain any action. The point was previously made in the interlocutory proceedings before Mustapha J in exh AB2 at p 5B (last sentence).

The submissions advanced by counsel for the plaintiffs in reply may also be conveniently taken from his written submission and are as follows:

(i) Before he died, Cheong Au Pit gave his vegetable plot which included the assets on the plot and the tenancy coupled with equity of the plot, to P1, P2, P3 and PW1.

Pursuant to this, the plaintiffs and PW1 worked the vegetable plot, used the income to support themselves and their families, and shared the remaining profit among themselves. There was no condition against subletting or assigning the tenancy of the vegetable plots. The only requirement of the Khoo Kongsi appears to be that the assignee of a tenancy, if he wanted to have himself registered as the tenant, had to appear before the board and agree on the terms. Cheong Au Pit's gift of the vegetable plot to the plaintiffs and PW1 had been perfected by their possession and cultivation of the vegetable plot during Cheong Au Pit's lifetime and thereafter.

(ii) The Statute of Frauds had no application to the gift of the vegetable plots to the plaintiffs and PW1, which had been perfected while Cheong Au Pit was still alive. This is not an action based on any contract for the sale, or other disposition of land, or any interest in land. Failing to see this distinction would, in the words of Arulanandom J in *Kok Ek Chooi v Cheah Soon Neoh*,[7] be 'to indulge in ostrichism'.

In my view, provided always that the plaintiffs are able to establish the essential facts relied upon by counsel on their behalf — and this is a question I shall have to consider later — I agree with counsel as to the legal consequences which flow from those facts and so would overrule this branch of the locus standi objection.

Self-help

I accept the proposition, as indeed I am bound to, by reason of the judgment of the Supreme Court in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang*,[10] that if, but only if, the plaintiffs are held by the court to be trespassers in law — an issue which I shall have to consider later in this judgment — then the remedy of self-help would be available to D1 and D3.

Res judicata and issue estoppel

It was contended by counsel for the defendants that the plaintiffs' claim to the portion of the plot concerned, etched in black in exh P14 was barred by reason of the judgment of Mustapha J reported under the name of *Cheng Hang Guan & Ors v Perumahan Farlim (Pg) Sdn Bhd & Anor*.[11]

The material facts so far as this part of the case is concerned were these:

The plaintiffs had obtained an injunction to restrain D1 and D2 from trespassing upon the two dwelling houses and the farm. That injunction was later dissolved upon the application of the defendants therein (see the judgment of Mustapha J) and there was no appeal from that decision.

Accordingly, it was contended that the dissolution of the injunction meant that the plaintiffs had no interest in the portion of the plot concerned, etched in black in exh P14, and so the plaintiffs' claims to that portion were barred by res judicata and issue estoppel. In support, the case of *Government of Malaysia v Dato Chong Kok Lim*[12] was cited, wherein the well-known proposition that a decision at one stage of the proceedings was binding on the parties, not only in subsequent proceedings between the same parties, but also at a later stage in the same proceedings, was stated.

I regret that I am unable to accede to this branch of the submissions of counsel for the defendants.

In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors*,[2] I had occasion to consider the effect of the judgment of Mustapha J. What I said at p 93 was this:

> In my opinion, the order of Mustapha J refusing the plaintiffs the interlocutory injunction in so far as the vegetable plot was concerned, on the ground that damages would be an adequate remedy, was merely a prima facie view and lacked the essential element of finality since it is always open to the High Court, at the final hearing, to review the question involved and to arrive at an opposite conclusion in the light of all the evidence, both oral and documentary, should the circumstances so require. Accordingly, the legal effect of the refusal of the interlocutory injunction was simply, that at the interlocutory stage, based on the limited material then available, the plaintiffs were not entitled to the injuctive relief claimed.

I can think of no reason for departing from anything I had then said and I would add, that in any event, Mustapha J did not decide that the plaintiffs had no interest in the portion of the plot concerned, etched in black in P14.

Accordingly, I would overrule the pleas of res judicata and issue estoppel.

Having disposed of the preliminary objections, I must now embark upon a consideration of the merits. The issues which arise as regards this part of case, may be stated thuswise.

(1) What was the area of the plot concerned of which the plaintiffs had possession? More particularly, whether, at all material times, the plaintiffs have been in possession of the plot concerned comprised in Lot 2532, Mk 13, DTL, Pulau Pinang, having an area of approximately 121,619sq ft (or 2.8 acres) which is shown and delienated in orange in the survey plan, exh P16 ?

(2)(a) Whether, at all material times, the plaintiffs were, both in law and in equity, entitled to possession of the plot concerned including the houses, pigsties and structures erected thereon?

(b) Were the notices to quit served upon the plaintiffs valid in law ?

(3)(a) Whether D1 and D2 had on 18 June 1982 committed trespass and created nuisance on the portion of the plot concerned, etched in black on exh P14 ?

(b) Whether D3 and D4 had on 17 March 1988 committed trespass and created nuisance on the portion etched orange on exh P14 and have been in unlawful occupation of the portion etched black on exh P14?

(4)(a) If the plaintiffs succeed in establishing liability against D1, D2, D3 and D4, then what is the appropriate sum to award by way of damages?

(b) Whether the plaintiffs are entitled to aggravated damages and/or exemplary damages ?

(c) Whether the plaintiffs are entitled to an injunction ?

(d) Whether the plaintiffs are entitled to any other, and if so, what remedies?

As to issue one — what was the area of the land concerned in the possession of the plaintiffs?

There was an acute conflict of evidence on this question if the versions of the plaintiffs and the defendants were compared, the plaintiffs' contention being that the area in their possession was 2.8 acres or approximately 121,619sq ft, while the defendants' version was that the area was as little as 9,000sq ft.

Broadly stated, the evidence relied upon by the plaintiffs and the contentions advanced by their counsel were as follows:

(1) the evidence of P2 who, under cross-examination, stated that the area of her vegetable plot was 2.8 acres;

(2) the evidence of PW1 who stated that at the time of Cheong Au Pit's death in 1969, the area in their possession was the area delienated in orange on exh P16, ie approximately 2.8 acres;

(3) exhibit P16 was a survey plan prepared by a qualified and competent surveyor on 10 September 1982 for use in the interlocutory proceedings in this case and although nine years had elapsed since P16 was first used as an exhibit in this case, the defendants had not produced any plan drawn by their surveyor contradicting or qualifying the accuracy of exh P16; and

(4) Khalid bin Abdul Aziz (PW9) had visited the farm on 9 September 1982, carried out the survey and produced exhs P37A and 37B which show the measurements and other particulars such as houses, pig sties,

vegetable farm, etc. These documents produced by a competent surveyor corroborated P2 and PW1's evidence that the plaintiffs had been in possession of nearly 2.8 acres of land.

On the other hand, the evidence relied upon by the defendants and the contentions of their counsel were as follows:

(1) the plaintiffs admitted, as a fact in the proceedings before Mustapha J, that the area let was 9,000sq ft and the rental paid was 90 sen at 10 sen per 1,000sq ft per month. See exh AB2 at p 2C (notes of proceedings on 21 July 1982). These notes of proceedings (at pp 1–7 of exh AB2) were admitted as to the truth of its contents in this trial on 19 August 1991;

(2) independent (and unchallenged) evidence of Khoo Peng Tee (the trustee), by his affidavit (at pp 64–68 of exh BA(1)), and Khoo Gin Pye, by his affidavit (at pp 74–77 of exh BA(1)), as to the policy of the Khoo Kongsi to charge 10 sen per 1000sq ft of vegetable land and, as Cheong Au Pit was paying 90 sen for his vegetable plot, the area let, with reference to the rent, was only 9,000sq ft (neither was called as a witness at the trial, the later having died before the hearing); and

(3) further, the evidence showed that the vegetable plot let to Cheong Au Pit was the plot adjoining house No 258K. Since that area, as claimed by the plaintiffs, exceeded 9,000sq ft, it was clear that the area etched in black in exh P14 could not be part of the land let to Cheong Au Pit. Consequently, none of the plaintiffs or the estate of Cheong Au Pit could lay any claim to this area.

Counsel for the defendants attacked the evidence relied upon by the plaintiffs in these terms:

(1) The admission of fact, before Mustapha J, referred to in para 5.2 (supra), is binding on the plaintiffs and no attempt had been made, at anytime, to withdraw or correct this admission. It is therefore too late to contend otherwise now.

(2) An admission once made is binding on the parties and their privies and the fact admitted need not be proved for the admission dispenses with the proof.

Note s 17 of the Evidence Act 1950; Field, 2 *Law of Evidence* (11th Ed, 1990) at p 1245 para 29, 'Admission of Adverse Party' — 'it is the best piece of evidence'; and Cross' *Evidence* (6th Ed, 1985) at p 517, 'Admissions' ('A party's statement ...'); at p 521, 'Vicarious Admissions' ('Admissions by those in privity ...').

(3) In accordance with this, [there was a] judicial admission in open court that the plaintiffs were required, and they undertook, to produce a surveyor's plan showing the area of 9,000sq ft of the vegetable land (see exh AB2 at p 2C).

(4) The plaintiffs delivered exh P16 to D1 and D2's solicitors in purported compliance with the undertaking; contrary to the admission and undertaking, P16 showed the area to be 121,000sq ft!

The defendants challenge the accuracy and admissibility of P16 as follows:

(a) The plaintiffs placed great reliance on P16 and P14. The former came from PW8 and PW9, whilst the latter came from PW2. The common source of information as to both is PW1. The veracity of PW1, including her own evidence on this, is very much in doubt.

(b) There is also a challenge to the manner in which the measurements shown in P16 were taken. These measurements were, as stated earlier, carried out to show that 9,000sq ft were occupied. For this reason, DW6's assistance was sought to verify the actual area of 9,000sq ft but DW6, for the reasons set out in para 7 of his affidavit (at pp 69–73 of exh BA(1)), was unable to point out the area occupied. The lack of compass points was admitted by PW8 who also confirmed para 7 (at p 71 of exh BA(1)).

(c) Despite the fact that pp 69–73 of exh BA(1) were filed well in advance, the plaintiffs took no steps to verify the situation. The plaintiffs only looked for PW8 in September 1991 (in the middle of the trial).

(d) The data in P16, as well as in D38 (the field diagram), were said to originate from the field book. It was also based on the traverse done by Syarikat KT Wah. The accuracy of the latter's traverse was not verified. All PW8 could say was that it was the practice not to query the traverse of another surveyor. This may be professional courtesy but it is certainly not a guarantee of correctness. There is no supporting evidence. DW6's report (exh D56) is otherwise.

(e) PW8's own evidence states that without the field book, there was insufficient material to justify the accuracy of the survey. Further, in his own conclusion to P37 (the report), he states that there was insufficient data to render the measurements accurate. That conclusion was repudiated by PW9, the field technician. He said that there was a sufficient number of 'ocm' points. If that be so, then it is not borne out.

(f) There is another matter of importance: that PW9 used a CP (ie certified plan), which was not even mentioned in exh P37 — a material omission. Further, the CP number was not referred to in the diagram (exh D38) or even in exh P16. The omission is unusual.

(g) The field book is missing. PW8 was never told that his plan was being challenged from the very inception, that is to say, September 1982, some two weeks after the alleged survey. Had PW8 been so told, the field book, on which the data depends, would have been preserved. The fault for the loss or unavailability of the field book must rest squarely with the plaintiffs.

(h) The plan contains no certification or authentication by PW8 except to bear his signature. There are no contemporary records of what the instructions were, what information was provided to PW8 and his staff. In the absence of these and the field book, the evidence of PW8 and PW9 as well as the plan, exh P16, is highly suspect.

(i) Exhibit P14 was drawn by PW2 in his office after a visit to the site in March 1988, on the instructions of the solicitors for the plaintiffs. He had no personal knowledge of the contents. All the information therein was provided by PW1, the source of whose knowledge is yet to be proved by admissible evidence.

(j) There is also a conflict in the evidence of PW1 and PW2 as to the circumstances under which and the place where and the time when exh P14 was drawn. According to PW1, exh P14 was drawn by PW2 independently and shown to her. Exhibit P16 was made available to PW1 without being told that the accuracy of P16 had been challenged.
(k) PW2 was unable to answer as to how and when he observed the stream, which was not in existence in March 1988. He was forced to fall back on exh P16. Further, he had no other records of the contents in exh P14.
(l) PW2 had not visited the site before and he was unable to say of his own personal knowedge the extent of, or the kind of cultivation on, and the items destroyed either in 1982 or for that matter even in 1988.

It was also said that there appear to be several inconsistent versions of the area as claimed by the plaintiffs, for example:

(a) An earlier map extracted by the defendants' surveyor, Anthony Chai Wee Siong, a director of D3 in charge of building work (DW6) (see p 5 of exh DAB of the defendants), on which he and Ng Bock Tye (DW4), were cross-examined, shows the area occupied to be far less than shown in exh P16.
(b) The measurements done at the request of the Tripartite Committee in the presence of the representatives of the residents' association, assisted by PW1 (as admited by her in cross-examination) show a lesser area; see the plan D40 and the minutes of the Tripartite Committee meeting (exhs D41 and D42), the contents of which were proved by DW2 and DW4. This measurement is far less than 100,000sq ft.
(c) The measurements done in 1969 by the Khoo Kongsi show that the area was again less than the area now claimed; the book of measurements was tendered as exh ID45; it emanated from the Khoo Kongsi; it was handed to DW1; it was produced by DW1; being a document of more than 20 years, its genuineness is presumed by s 90 of the Evidence Act 1950; the documents should now be marked as exh D45.

It was submitted that when the measurements were done in 1969, there was no reason for the Khoo Kongsi to misstate the true position and none was suggested by the plaintiffs; this went to show how uncertain and unrealiable the plaintiffs' own case was on the question of the area let to Cheong Au Pit.

Counsel for the defendants also contended for the following conclusions on the law:

(1) By occupying a larger area than was let, the said Cheong Au Pit was already a trespasser which trespass was continued by the plaintiffs.
(2) There was no question of waiver by the Khoo Kongsi as to the area occupied; the failure to take action cannot amount to a grant of the tenancy of the larger area occupied. Khoo Peng Tee (the trustee), had explained in his affidavit the reasons why action was or could not be taken. There was no plea of any waiver in the pleadings. The plaintiffs had filed no reply to the defence of D1 which squarely raised this issue.
(3) The evidence of PW1 as to the area let to Cheong Au Pit was wholly hearsay and inadmissible; she had no personal knowledge whatever.

In reply, counsel for the plaintiffs submitted as follows:

(a) The defendants had not produced any evidence of the alleged policy of the Khoo Kongsi to charge 10 sen per 1,000sq ft of vegetable land. DW3, secretary of the Khoo Kongsi, could not produce any records to substantiate this claim, although he had looked at all the minutes of the Khoo Kongsi, either by himself or with the assistance of another person. All he could produce was a notice issued in 1941. He had heard of this policy from old trustees only in 1984 during *Poh Swee Siang*'s case.[10] He did not know of even one farm in Thean Teik Estate where rent is collected at the rate of 10 sen per 1,000sq ft.

(b) Exhibit D48, the minutes of the Khoo Kongsi, clearly shows that there was no such policy. Each application for renting vegetable land was considered on its own merits by the board, who then fixed the rental and other terms of the tenancy. Cheong Au Pit's tenancy must have commenced well before 1938 and that could explain the low rental paid by him.

(c) If the area rented to Cheong Au Pit was 9,000sq ft, as alleged by the plaintiffs, then the Khoo Kongsi would have taken action against him for occupying 121,000sq ft but no such action was ever taken, although, according to exh ID45 (said to be the Khoo Kongsi's book of survey, which has not been proved), Cheong Au Pit was alleged to be occupying 49,000sq ft in 1969. Until D1 came into the picture and the alleged notices of termination were issued, the Khoo Kongsi had been accepting rent from P2 for the area in the possession of the plaintiffs. The Khoo Kongsi would not tolerate even the chopping of a branch of a cempedak tree. Would they permit a tenant to occupy an area 13 times the size rented by him? The only reasonable inference from the Khoo Kongsi's conduct is that Cheong Au Pit was in possession of 121,000sq ft of land with their consent, paying a rental of 90 sen.

As regards the contention of counsel for the defendants that the area occupied by the plaintiffs was only 49,238sq ft having regard to the measurements taken by David Tan Yok Seng (DW2), recorded in exh D40, and not 2.8 acres as claimed by the plaintiffs, counsel for the plaintiff submitted as follows:

(a) Exhibit D40 was drawn by David Tan, an employee of the defendants, who had no training experience or competence in survey work. The area was calculated by DW1, a highly interested party, in the absence of the plaintiffs. DW1 also has no training experience or competence in survey work. The plaintiffs, as soon as they came to know of the alleged results of the 'survey', objected to the figures (exh D7), but D3 did not take any steps to get an accurate survey done by a qualified surveyor.

(b) The area in the possession of the plaintiffs had been hotly disputed since July 1982. Therefore, why was it that neither D1 nor D3, who are big developers, carried out an independent survey so as to ascertain the area, instead of asking DW6, a qualified surveyor, to draw squares and rectangles on the survey plan prepared by Datuk Ayob, exh P16? They had an opportunity to verify the truth of the plaintiffs' claim and the

accuracy of exh P16 but they chose not to take advantage of it. Why? The only reasonable inference was that they did not want their own surveyor to confirm the claim of the plaintiffs and the accuracy of exh P16.

As regards the contention of counsel for the defendants that the plaintiffs admitted before Mustapha J that the area let was only 9,000sq ft and that the rental was 10 sen per 1,000sq ft, counsel for the plaintiffs submitted as follows:

(a) The notes of Mustapha J were brief and incomplete. In his submission on 29 September 1982 (exh AB2 para 2F), the plaintiffs' counsel, Mr Tan, relied on the affidavit of P1 and P2 which clearly stated that they were occupying about three acres of land (exh BA1 at p 47 para 4). If he had admitted that the area occupied by the plaintiffs was only 9,000sq ft, why did he submit otherwise at the hearing of his application?
(b) The application for the injunction proceeded on the basis that there was a dispute as to the area rented by the plaintiffs and the defendants' counsel submitted that the Khoo Kongsi could not have rented out the area claimed by the plaintiffs because of the alleged policy of the Khoo Kongsi and the byelaws of the local authority on this. Therefore, where was the judicial admission of the plaintiffs as submitted by the defendants' counsel? (See exh BA1 at p 17, paras 15–16; exh BA1 at p 71, paras 5 and 13–16; exh AB2 at p 4F; and exh AB2 at p 5F.)
(c) If there was such an admission, then why did the defendants call witnesses to testify on the area in the possession of the plaintiffs?

As regards the contention of counsel for the defendants that the area etched black on exh P14 could not be part of the land let to Cheong Au Pit, counsel for the plaintiffs submitted that this contention was open to the following criticisms:

(a) exh D40 clearly showed the area etched black on exh P14 to be part of the plaintiffs' farm;
(b) David Tan (DW2), testified that the said area was part of the plaintiffs' farm; and
(c) if the said area was not part of the plaintiffs' farm, then why negotiate (as claimed by the defendants but denied by the plaintiffs) with PW1 as an agent of the plaintiffs?

After careful consideration, I uphold the submissions of counsel for the plaintiffs because, with respect, I did not consider that counsel for the defendants had any real answer to the reply of counsel for the plaintiffs, so far as this part of the case was concerned.

It follows that I find, as a fact, that the area in the possession of the plaintiffs was at all material times to this suit, 2.8 acres or approximately 121,619sq ft.

As to issue two — what notice to quit was necessary to determine the plaintiffs' tenancies of the farm and the two dwelling houses, assuming such tenancies were not coupled with an equity ?

A The Khoo Kongsi gave one month's notice to quit in respect of the two dwelling houses and the farm after the acts of alleged trespass on 18 June 1982.

The arguments advanced by counsel for the plaintiffs in respect of these notices to quit were twofold, [namely]:

B (a) that the period of the notice to quit was insufficient; and
(b) that Khoo Kah Seng (DW3), a trustee of the Khoo Kongsi, had no authority to instruct the Khoo Kongsi's solicitors, Ms Shearn Delamore & Co, to issue the notices to quit.

As to (a), namely, the sufficiency or otherwise of the notice to quit, the rival C submissions of the parties must now be considered.

The gist of the submissions of counsel for the defendants regarding this part of the case was that the period of one month's notice was sufficient to terminate the tenancy of both the farm and the two dwelling houses because:

D (i) the conditions appearing in the rent receipts provided for one month's notice, and a few of these receipts had been produced by the plaintiffs themselves when applying for interlocutory injunctions before Mustapha J; and

(ii) the surrounding circumstances, especially the fact that rent was paid by E reference to the month, and the general notice by the trustees of the Khoo Kongsi dated 1 March 1941, in Chinese, with an English translation which said this:

NOTICE

Notice is hereby given that owners of houses built in Sin Kang Plantation are not F allowed to charge, mortgage, transfer, buy, sell, exchange, remove, and make repairs, alterations or additions to their houses, whether new or old, without the previous consent of the Kongsi in writing.

Should they be found to infringe any of the above conditions, the Kongsi shall have the right, after three months' notice shall have been given to the owners, to proceed with the demolition of the said house at the expense of the G owners and no compensation, damages or claims whatsoever will be entertained or paid by the Kongsi.

The Trustees
Leong San Tong Khoo Kongsi
Penang
1 March 1941

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showed the temporary nature of the tenancies and some of these were produced at the trial of Poh Swee Siang on 30 June 1982 which went to confirm their genuineness and authenticity.

As to (i), the gist of the submissions of counsel for the plaintiffs was that 'the conditions' had been introduced for the first time on receipts issued to I P2 on 31 October 1981, that is less than a year before the tenancies were terminated and decades after the plaintiffs and their ancestors had been staying on the plot concerned, and so had no contractual force.

It was also argued that 'the conditions' were in English, which the plaintiffs, who were illiterate farmers, did not understand and so it would be wrong to infer that the plaintiffs had, by conduct, accepted them as such. Accordingly, it was said that there was no material upon which it could be said that the plaintiffs had, by their conduct, accepted the conditions in accordance with the principles enunciated by Lim Beng Choon J in *Mohd Ismail v Lim Sok Cheng*.[13]

Now, a receipt is, of course, in law, only evidence of the payment of a sum of money. It does not consitute a contract, nor can it have the effect of an estoppel. The true intention of the parties must be established by evidence at the trial. It is not difficult to cite an anthology of cases for these principles. My choice is *Lee v Lancashire Yorkshire Railway Co*;[14] *Hockle v London County Council*;[15] and *Oliver v Nautilus Steam Shipping Co Ltd*.[16]

Having said that, I accept that the inclusion of the inscription in the receipt stating that the period of one month's notice would be sufficient to terminate the tenancy might, in certain circumstances, amount to a stipulation imposed by a landlord upon his tenant; see for example, *Loke Yung Hong v Shanghai Furniture Co & Anor*,[17] where Pretheroe Ag CJ said this [at p 140]:

> Now, what was the legal effect of including those words in the receipt? I do not think that they can be regarded as being a clause in the contract to which the tenant agreed: rather I think they were a stipulation imposed by the landlord upon the tenant. It is true that neither the word 'condition' nor the word 'stipulation' appears, but this fact, of itself, will not prevent the prohibition from being a condition (*Henniker v Watt* (1828) 8 B & C 308). Evidence was given at the trial that the appellant has those words printed on every receipt he gives for rent or for any deposit made by a prospective tenant: that this is the common practice of landlords in Kuala Lumpur and finally, as I have already stated, that the first respondents knew that the effect of the words was to prohibit any assignment by them. In my opinion, therefore, these words define an event which was intended to end a state of things which, but for its happening, would have continued, and therefore they constitute a condition.

First of all, it would be convenient to reproduce the conditions appearing on the reverse of the rent receipts dated 31 October 1981 (at pp 9–12 of exh AB1) in respect of the farm and the two dwelling houses.

In respect of the farm, the conditions were as follows:

(1) This lease is optional to both parties, ie the landowners and vegetable gardeners (serving as ground tenant), carrying one month's notice from either side for its termination.
(2) Upon termination of lease, the vegetable gardeners hold the privilege to extend the lease up to the time when the last cultivated crops are harvested.
(3) No party is bound to pay any claim/compensation in kind for the termination of the lease.
(4) The vegetable gardeners will maintain the land in vacant condition at all times and will refrain from making construction of any erections altogether on the land.
(5) If no cultivation of vegetables is made within a one month period and weeds are allowed to grow in place, the landowners hold the right to cancel the lease forthwith without any written warning to the vegetable gardeners.

In respect of the two dwelling houses, the conditions were as follows:

(1) Rent collected is for site of house only.
(2) No ex gratia payment will be made when site is required by our Kongsi.
(3) Notice is hereby given that all owners of houses, buildings, sheds, etc, erected in Sin Kang Estate are not permitted to repair or make alterations, extensions, enclosures, transfer ownership, change attap roof, corrugated iron roof, asbestos roof, pigsties, poultry pens, including the building of new houses, etc, unless prior permission in writing has been obtained from the trustees of the Khoo Kongsi.

Should any ground tenant be found to have infringed any of the above conditions, the Kongsi shall have the right to demolish any building, etc at the expense of the owners and no compensation or claims will be entertained by the Kongsi.

In the present case, however, apart from the testimony of Khoo Kah Seng (DW3), a trustee of the Khoo Kongsi, there is no evidence that the conditions appearing in the rent receipts, whether in respect of vegetable lands or the dwelling houses, had been introduced from the inception of the tenancies, nor is there anything to show that the plaintiffs or their ancestors, who had no knowledge of the English language, could be said to have accepted the 'conditions'. (See, eg *Balwant Singh v Tong Lam & Co*,[18] per Rose CJ at p 34 col 1G.)

Counsel for the defendants did point out that this witness had testified that the receipts produced in court, bearing the condition concerned, 'formed part of receipts previously used, omitted for a while by mistake and then reinstated'. It was suggested that if DW3's testimony on this point were untrue, the plaintiffs would have been expected to adduce evidence of past receipts by way of rebuttal.

On the other hand, counsel for the plaintiffs drew my attention to the fact that DW3 had admitted, under cross-examination, that the conditions on the receipt were endorsed thereon only after 1976, but later qualified that by saying that the conditions were not new and had been endorsed on earlier receipts but that when challenged to produce duplicates or counterfoils of receipts issued prior to 31 October 1981 to P2, with the conditions endorsed thereon to support his assertion, was unable to produce even a single one. Upon then being reminded about his testimony in *Poh Swee Siang*'s case,[10] D3 finally admitted that the conditions were indorsed on receipts only after 1976. And, in the case of the plaintiffs, DW3 admitted that the conditions had been endorsed on the receipts issued to them only since 31 October 1981 (see exh AB1 at p 9).

It was emphasized that although the defendants had produced the old Khoo Kongsi notice dated 1 March 1941 (exh DAB at p 26), they had studiously refrained from producing even a single duplicate or counterfoil of a receipt bearing the condition issued to the plaintiffs before 31 October 1981. Similarly, it was emphasized that although the defendant had produced documents (exhs D11 and D12) containing a condition relating to the tenancies of houses, they had not produced even a single document (whether board minutes or notices) where the alleged conditions of tenancy of vegetable lands were recorded.

Even if counsel for the defendants' evaluation of DW3's testimony were accepted, it is not at all clear as to what DW3's source of knowledge was as to when the conditions appearing in the receipts were first introduced. It was not at all clear whether he had personal knowledge of these matters or even whether these alleged events occurred while he was a trustee. It looks very much as though his testimony regarding these alleged events was derived from information provided to him by others, in which case, it would be worthless as evidence, being purely hearsay. Certainly, if what he said were true, I would have expected the defendants to have adduced in evidence counterfoils or duplicates of earlier receipts by way of corroboration. The Khoo Kongsi was an association with many members and I would have expected it to have kept such records. It is true that neither did the plaintiffs produced rent receipts issued by the Khoo Kongsi prior to 1981, but it must be recognized, that in contrast to the Khoo Kongsi, they are illiterate farmers who might not have appreciated the importance of keeping old receipts.

But, more importantly, the onus of proving that the conditions on the receipt had contractual force was upon the defendants who were relying upon that condition and not upon the plaintiffs to prove the converse. No adverse inference may therefore be drawn against the plaintiffs for this omission, even assuming, for the sake of argument, such old receipts were available.

I must also add that the mere fact that on the hearing of their application for an interlocutory injunction before Mustapha J, the plaintiffs had themselves used the rent receipts bearing the conditions aforesaid as evidence, does not in any way debar them from contending at the final hearing that those conditions are invalid in law. The plaintiffs never relied upon the conditions on the rent receipts and, indeed, during the interlocutory proceedings, the plaintiffs' contention was that their tenancies were coupled with an equity while the defendants' contention was that the plaintiffs' tenancy was a mere monthly tenancy which had been determined by one month's notice to quit, and that thereafter they continued in occupation as trespassers.

Before this court, the parties have persisted in those contentions. I, therefore, fail to see how it could be said that *whereas* at the interlocutory stage the plaintiffs had accepted the validity of the alleged conditions, they had, at the final hearing, changed their tune. The plaintiffs have been consistent in the legal position they have taken, both at the interlocutory stage and at the final hearing. I regret, therefore, that I cannot agree with the submission of counsel for the defendants regarding this part of the case.

In the circumstances, I find that the conditions appearing in the rent receipts are devoid of legal effect and must therefore be disregarded in considering the question of the sufficiency or otherwise of the notice to quit.

As to (ii), the gist of the submission of counsel for the defendants was that any tenancy which is void for want of registration, would only take effect as a monthly tenancy where, as here, rent is paid by reference to the month. In support, the Federal Court decision in *Lee Ah Low v Cheong Lep Keen*,[19] (Ali and Suffian FJJ; Ong CJ dissenting) was cited. He also relied on

A the minutes of the Khoo Kongsi (exh P48 at p 5) which indicated that even tenancies of Khoo clansmen were terminable on one month's notice as well as the testimony of a trustee of the Khoo Kongsi, Khoo Kah Seng (DW3), that land could be repossessed by the Khoo Kongsi at any time.

On the other hand, the gist of the submission of counsel for the plaintiffs was that although rent had been paid on a monthly basis, it did not necessarily follow that the tenancies could be determined by a month's notice. In order to determine the appropriate period of the notice to quit — and this was a question of fact — regard had to be had to the surrounding circumstances of each case and not just the mode of payment of rent. In support, the cases of *Syed Mohd Alsagoff v Max Behr*,[20] *Tay Boon Huat v Kulsam Bee*,[21] and *ALMM Muthukaruppan Chettiar v Haji Ibrahim*[22] were cited.

In *Syed Mohd Alsagoff v Max Behr*,[20] the court held:

> Whether a tenant, who holds for a term of years, and after the expiration of the lease continues to do so, paying rent for his holding, is a tenant from year to year or otherwise, is a question of fact to be gathered from the circumstances; but ought to be such a tenant (sic) as is just and fair between the parties. The leaning of authorities is, however, in favour of the presumption of the tenancy being from year to year; and the reason for this, is founded mainly on common sense and justice. Neither the practice in this Colony to let from month to month, nor the fact that by the former lease rent is reserved not by the year, but by the month, rebuts the presumption.

In *Tay Boon Huat v Kulsam Bee*,[21] the court held that four months' notice would be reasonable for the determination of the tenancy of a market garden. The tenant had been in occupation of the land for about three years and was paying rent on a monthly basis.

In *ALMM Muthukaruppan Chettiar v Haji Ibrahim*,[22] McElwaine CJ said this at p 152:

> The principle of the English law in such cases as monthly tenancies is that apart from agreement as to notice, the notice must reasonable in all the circumstances and the same principle should be applied here.

Counsel for the plaintiffs contended that having regard to the above authorities and the circumstances of the case, one year's notice would be reasonable to determine the tenancies. Counsel suggested that no distinction should be made between the period required for determining the tenancies of the dwelling houses and the tenancies of the farm because, on the facts, the two tenancies were interlinked and for a common purpose, that is, for the livelihood of Cheong Au Pit and his family.

I note that the majority judgment in *Lee Ah Low v Cheong Lep Keen*,[19] was considerably watered down by the Federal Court in *Yong Tong Hong v Siew Soon Wah & Ors*[23] (Ong CJ, Suffian and Gill FJJ). At p 107 col 1C–E, Ong CJ, speaking for the Federal Court, said:

> Every case must, of course, be decided according to its peculiar facts. The distinction must be drawn between cases where the tenant can resist his landlord's claim on equitable grounds and others where he has no such grounds. An example is *Lee Ah Low v Cheong Lep Keen*, a recent decision of this court. There the tenant was given a tenancy for 80 years during which period the landlord

agreed not to increase the rent unless the assessment rate was raised by the municipality and the tenant was at liberty to use the premises for carrying on any type of business. The monthly rent was $100 and the tenant was given a month's notice to quit. No equity had been created in his favour, as in *Inwards v Baker* [1965] 2 QB 29, by his going into possession. Accordingly the sole question to be determined was whether the premises were held under a yearly or monthly tenancy by reason of the lease being void for non-registration. That case was not as fully argued as it might have been, nor were the cases cited which have been brought now to our attention and carefully distinguished. The ratio decidendi, therefore, should not, in my view, be regarded as a binding precedent for all cases where premises are let for a term of years at a monthly rent under a lease void for non-registration.

It will be recalled that Suffian FJ (as he then was), was a party to the decision in both *Lee Ah Low*[19] and *Yong Tong Hong*,[23] and must therefore be taken to have concurred in the watering down of the majority judgment in *Lee Ah Low*.[19]

In *Adler v Blackman*,[24] two principles emerge, namely, first, as pointed out by Sommerville LJ at p 148, the presumption as to the nature of the tenancy on holding over is a rebuttable presumption; and secondly, as pointed out by Jenkins LJ at p 152:

... what one is seeking here is the intention to be imputed to the parties from the facts that the tenant has remained in occupation with the consent of the landlord and has paid rent, after the expiration of the term of the original letting. As I have said, I think at highest in favour of the tenant the implication here, so far as it is based simply on those bare facts, is equivocal owing to the absence of any reservation of rent expressed as an annual sum. It follows, in my view, that other evidence may be resorted to for the purpose of ascertaining what their true intention was.

Clearly, while the mode of payment of rent is an important factor in determining the question of the sufficiency of the period of a notice to quit, it is not necessarily a decisive factor; other evidence (if available) must therefore also be thrown into the scales and weighed.

To return to the case of *Lee Ah Low*,[19] it appears to me that that case is distinguishable from the present case on the ground that there, unlike here, the crucial issue revolved around a question of construction of a written tenancy agreement. As Ali FJ, who delivered the majority judgment of the Federal Court, pointed out at p 11 col 1F et seq:

The answer to the first ground of appeal is that so far as the main question before the trial court was concerned with the validity or otherwise of the notice to quit it was clearly a question of law which fell to be decided in accordance with established legal principles acceptable to the courts in this country. The manner of payment of rent has always been the basis of consideration in the formulation of the principle stated in the English cases which, undoubtedly led the learned trial judge to come to the conclusion as he did in this case. If the trial court had any discretion in the matter, there might be ground for saying that the factors referred to by the appellant would be relevant for consideration. But this is not a case in which the court has to exercise a discretionary power but to construe the effect of the relevant term of the written agreement.

It follows that in the present case, there being no written tenancy agreement to construe, in considering the question what was the nature of the tenancies of the farm and the two dwelling houses which the plaintiffs held of the Khoo Kongsi and, more particularly, what notice to quit was necessary to determine those tenancies, assuming such tenancies were not coupled with an equity, I had to take into account not just the mode of payment of the rent but also other material factors, for example, the conduct and intention of the parties, the contemplated user of the subject matter of the tenancies and other relevant circumstances of the case as a whole. In other words, I have a discretion which, of course, has to be exercised judicially.

According to counsel for the plaintiffs, the material circumstances which I have to take into consideration are these — and here I would quote from his written submission at p 31 para 3.13 to p 32 para 1:

(a) Cheong Au Pit and his family members were pioneer settlers who, through their own industry and initiative, have transformed a swampy jungle into a productive vegetable farm. Three generations have lived and worked the plot for their subsistence. This fact alone leads to the inevitable inference that the intention of the parties was that Cheong Au Pit's tenancy was not a monthly tenancy. If it was a monthly tenancy, it was highly unlikely that Cheong Au Pit would have invested so much labour and money in developing the land and building his home there.

Cheong Au Pit's position cannot be compared with vegetable farmers who cultivate vegetable on the land of another with licence for a period of years. To Cheong Au Pit and his family, the farm has been their home and their source of livelihood for generations. Compare *Alsagoff*'s case, where a tenant holding over after the expiry of the lease for a mere term of years was held to be a tenant from year to year.

(b) Cheong Au Pit or the plaintiffs did not breach any of the regulations of the Khoo Kongsi.

(c) The Khoo Kongsi practice was to allow the family of deceased tenants to continue farming on condition they paid rent.

(d) There was no condition for determination of both the house and vegetable tenancy by a month's notice. The unilateral introduction [of the condition] by the Khoo Kongsi only after 1976 clearly shows that the tenancy of the plaintiffs was not monthly tenancy.

According to counsel for the defendants, apart from the fact that rent was paid by reference to the month — and this was a matter of prime importance — the minutes of the Khoo Kongsi (exh P48 at p 5) indicated that even the tenancies of Khoo clansmen could be determined by one month's notice and there was also the testimony of a trustee of the Khoo Kongsi, Khoo Kah Seng (DW3), that land could be repossessed by the Khoo Kongsi at any time.

There is, in my view, neither law nor custom which assists me in deciding what is a sufficient notice for the determination of the tenancies of the farm and the two dwelling houses. So I must, in the exercise of my discretion, decide what is a reasonable notice, regard being had to the particular circumstances of this case. This calls for a balancing exercise. In *Doe d Martin v Watts*,[25] Lord Kenyon said that:

> ... it would be extremely unjust that a tenant who occupies land should after he has sown it, be turned out of possession by an ejectment without any notice. And it was in order to avoid so unjust a measure that so long ago as the time of the Year Books it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without reasonable notice.

Adopting that approach to the circumstances of the present case, I do not consider that one month's notice would be either right or just as constituting reasonable notice, whether in respect of the vegetable land (the farm) or the dwelling houses. In this context, I agree with the submission of counsel for the plaintiffs that there is no distinction in principle between the farm and the two dwelling houses, in so far as the period of the notice to quit is concerned because the two tenancies were interlinked and had a common purpose, namely, the livelihood of Cheong Au Pit and his family.

Having said that however, I am not prepared to go all the way with counsel for the plaintiffs that the appropriate period of the notice to quit in this case should be one year. I say so because, as was rightly pointed out by Earnshaw J in *Tay Boon Huat v Kulsam*,[21] at p 54 paras 6–7, whilst in England there is for most crops only one period of growth, that is to say, during the spring and the summer, in this part of the world, we have a perpetual summer and, so far as market gardens are concerned, it is possible that many vegetables and some fruits can be grown more than once a year, if not all year round. Even if the tenancies were regarded as tenancies from year to year, six months' notice would be sufficient to terminate a tenancy of that sort. Upon the evidence, however, I do not consider that I can infer a tenancy from year to year.

It will be recalled that the general notice by the Khoo Kongsi dated 1 March 1941 (reproduced above), provides for the giving of three months' notice in the event of a breach of the conditions specified therein by the owners of houses. Even if there were evidence that such a notice had been duly sent and received by the owners of the houses concerned (and there was no such evidence), I fail to see how this assists the defendants, bearing in mind that Cheong Au Pit and his ancestors had been in occupation of the plot concerned long before that. In any event, the stipulation of three months' notice does not assist the defendants.

I might as well interpolate to add that I have not overlooked the submission of counsel for the defendants based on the minutes (exh P48 at p 5). These minutes purport to confirm events at a meeting of the Khoo Kongsi's board held on 18 April 1950 and show that it was the policy of the Khoo Kongsi to treat tenancies of farmland as transferable, subject to the intending transferee appearing before the Kongsi to confirm the rental payable. Exh D9 — a translation of excerpts from the minutes of board meetings of the Khoo Kongsi (1959) — appears to reinforce that view.

It is true that the minutes (exh P48 at p 5) indicated that the tenancies of Khoo clansmen were terminable on one month's notice, but these minutes related to a meeting held on 18 April 1950, and would therefore be evidence of the general practice of the Khoo Kongsi at that time only. In other words, it could not have the effect of taking away rights acquired by Cheong Au Pit long before such date.

A I had visited the locus in quo accompanied by counsel on both sides and bearing in mind the purpose of the lettings in this case and, having given the fullest consideration to the submissions advanced by counsel, I consider that three months' notice would be reasonable for the determination of the tenancies of the farm and the two houses, as this would afford the plaintiffs B sufficient time within which to harvest their crops and to yield vacant possession of the plot concerned. In this respect, I see no reason to distinguish between the farm and the houses for the reasons stated.

It follows, therefore, that the notices to quit of one month's duration issued by the solicitors for the Khoo Kongsi hereinbefore referred to, were not valid and therefore ineffective in law to determine the tenancies of the C vegetable land (the farm) and the two dwelling houses.

On this ground alone, the plaintiffs are entitled to remain in possession of the two dwelling houses and the farm and so D3's counterclaim for possession thereof must be dismissed with costs.

As to (b), was DW3 authorized to instruct solicitors to issue the notice to quit?

D The gist of the submission of counsel for the plaintiff was that DW3, in instructing the solicitors of the Khoo Kongsi to issue the notice to quit, had exceeded his authority and that therefore, the notices to quit were invalid. In support, my attention was drawn to the following matters:

E (1) DW3 had himself testified that it was the board of the Khoo Kongsi who had the authority to decide to grant or to terminate tenancies and that when this happened, a record would be made of it in the form of a minute in the appropriate minute book.

(2) The evidence disclosed that the board had not made a decision to terminate the tenancies of the plaintiff but that DW3 had, off his own F bat, so to speak, instructed solicitors to issue the notices to quit to the plaintiffs in respect of the two dwelling houses and the farm.

(3) There was no provision in the joint-venture agreement (exh AB1 at pp 31–48) empowering DW3 to terminate the tenancies of tenants of the Khoo Kongsi.

G The submissions of counsel for the plaintiffs regarding this part of the case are attractive, but it overlooks the cogent fact that, assuming for the sake of argument, that DW3 had exceeded his authority as alleged, there was ample evidence that the Khoo Kongsi had ratified the act of DW3 in instructing solicitors to issue the notice to quit. This branch of counsel for the plaintiffs' objections therefore fails.

H Was service of the notice to quit effective in law?

It was anticipated by counsel for the defendants that a separate objection might be taken by counsel for the plaintiffs that the notice to quit dated 20 July 1982, having been addressed to the deceased Cheong Au Pit, was for that reason invalid. In the event, however, counsel for the plaintiff did not take I the point.

However, as the point might be taken as a new point should there be an appeal from my decision, I think I should deal with it.

There is no dispute that the notices to quit had been received by the children of Cheong Au Pit who were in occupation of the farm and there is

authority for saying that notices to quit are validly served if left at the premises. (See *Lim Kien Mok v BH Kevan.*[26]) When, therefore, the notice to quit was received by the occupants, it was received as agents for and on behalf of the Official Administrator. (See *Teck Seng & Co v William Eu Keng Yuet;*[27] *Lai Seng Fook v Tang Kong Low.*[28])

In any event, I agree with the submission of counsel for the defendants that any defect with regard to the notice to quit dated 20 July 1982 was repaired by the second notice to quit dated 28 August 1982 which was addressed to P1 and P2 as the representatives of the estate of Cheong Au Pit.

Was dwelling house No 258K subject to the Control of Rent Act 1966?

It was contended by counsel for the plaintiffs that, as dwelling house No 258K had been completed by Cheong Au Pit prior to 31 January 1948, it was subject to the Control of Rent Act 1966.

But can a ground tenant be a protected tenant having regard to *Mok Deng Chee v Yap See Hooi*[29] and *Muniandy & Anor v Muhammad Abdul Kader?*[30]

I agree with counsel for the plaintiff that the passages relied on by counsel for the defendants in the above mentioned cases, are obiter dicta and contrary to the ratio decidendi of Ong J (as he then was) in *Nair v Chidambaram,*[31] which was not cited to or by the court in *Mok Deng Chee*[29] and *Muniandy.*[30]

The defendants did not attempt to satisfy the requirements of s 16(1) of the Control of Rent Act 1966 and so, this court has no jurisdiction to make an order for possession in respect of dwelling house No 258K.

In any event, therefore, the defendants' claim for possession of the dwelling house No 258K must, on this ground alone, be dismissed.

As to issue three — did there arise in the plaintiffs' favour an equity or equitable estoppel protecting their occupation of the plot concerned?

If I am wrong in the view I take regarding issue two, the next question I have to consider is whether the plaintiffs' occupation of the plot concerned is protected by an equity or equitable estoppel.

It will be recalled that the case for the plaintiffs regarding this issue had already been outlined earlier on in this judgment; any repetition would be tedious and unnecessary. So, without further ado, I shall proceed to make certain essential findings pertinent to this part of the case.

I am satisfied, upon the evidence before me, that the alleged promises or assurances had been made by the Khoo Kongsi, first, to Cheong Au Pit, these promises or assurances being that, so long as he continued to pay ground rent, he could stay and cultivate the farm as long as he wanted, that Cheong Au Pit told his daughter P2 of the same and, relying on the same, he and his family had converted what was once a swampy jungle land into a productive farm. He had also built dwelling house No 258K on the farm and this, I accept, was in existence even before 15 December 1938 — that being the date of birth of P2. In addition, in 1963, Cheong Au Pit also built dwelling house 258H on the farm with the consent of the Khoo

Kongsi and had it registered in the records of the Khoo Kongsi in the name of P2.

In my opinion, Cheong Au Pit would hardly have done these acts which involved unusual exertion and considerable expense unless those promises and assurances had in fact been made. Similarly, I accept the testimony of P2 that, after the death of Cheong Au Pit in 1963, she spent RM1,500 in providing a ceiling for dwelling house No 259H.

I also accept the testimony of P2 that sometime in 1972, the visiting trustee of the Khoo Kongsi had told P2 that it was not necessary to change the tenancy of the farm into her name and that she could continue planting vegetables as long as she wished, provided she paid rent and, that relying upon this assurance, the plaintiffs had invested money in installing a sprinkler system. In my opinion, the plaintiffs would hardly have incurred such substantial expenditure unless the visiting trustee had given the promise or assurance. Certainly, they would not have done so if they thought that all they had was a monthly tenancy terminable on just one month's notice.

Quite apart from the conduct of Cheong Au Pit and the plaintiffs following the promises and assurances given by the Khoo Kongsi to which I have just adverted, there was also other evidence whch was wholly consistent with these promises or assurances having been made. I refer to the testimony of Khoo Kah Seng (DW3), a trustee of the Khoo Kongsi, who, when asked what the Khoo Kongsi would do when a tenant of vegetable land died, replied, 'The tenancy will continue for the benefit of the family'. And when the matter was probed further, and he was asked, 'So long as they continued to pay rents, they could continue farming?', he replied, 'Yes'.

Having regard to the evidence of Khoo Kah Seng himself, regarding the practice of the Khoo Kongsi when a tenant of vegetable land died, there is thus no escape from the conclusion that the tenancies held by Cheong Au Pit of the Khoo Kongsi was not just for his benefit but also for the benefit of his family, and that these tenancies could not have been mere monthly tenancies.

I therefore have no hesitation in agreeing with the submission of counsel for the plaintiffs that the trustees of the Khoo Kongsi must have been fully aware of the social-cultural context upon which their legal relationship with Cheong Au Pit was based. In other words, they must have known that Cheong Au Pit was the head of an extended Chinese family and the farming activities carried on were for the benefit of this extended family.

In arriving at my conclusion regarding this part of the case, I have given the fullest consideration to the careful submissions of counsel for the defendants but I regret that I am unable to accede to them for reasons I shall now state.

First of all, it was submitted by counsel for the defendants that the evidence of P2 of statements made to her by Cheong Au Pit regarding the promises or assurances made by the Khoo Kongsi, was hearsay and inadmissible.

Similarly, it was contended that the evidence of P2 regarding the promises or assurances made to her by the visiting trustee suffered from the same defect.

I regret I cannot agree. It is well established that such evidence is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. (See *Subramaniam v PP*.[32])

As the Privy Council pointed out in *Subramaniam*'s case,[32] the fact that a statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness.

In the present case, the plaintiffs' case was that it was because Cheong Au Pit believed the promises or assurances (whether genuine or not) by the Khoo Kongsi, that he was induced to engage in his farming and construction activities. And, similarly, it was because P2 believed the promises or assurances (whether genuine or not) of the visiting trustee, that she and the other plaintiffs were induced to continue with the farming activities and to expend a substantial sum of money in the installation of a sprinkler system. Therefore, evidence of the promises or assurances concerned had been adduced not to prove that those promises or assurances were true in the sense that the Khoo Kongsi intended to keep those promises or to live up to those assurances, but for the purpose of showing that it was by reason of those promises or assurances that Cheong Au Pit and the plaintiffs had been induced to act in the manner aforesaid to their detriment.

Secondly, it was submitted by counsel for the defendants that the evidence of P2 as to the promises or assurances by an unidentified person said to be the visiting trustee or supervisor of the Khoo Kongsi in 1972 was, in any event, inadmissible because the Khoo Kongsi was not a party to these proceedings.

I think that this submission overlooks ss 18(3)(a) and (b) of the Evidence Act 1950 which read as follows:

> Statements made by—
>
> (a) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested; or
> (b) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,
>
> are admissions if they are made during the continuance of the interest of the persons making the statements.

The facts relevant to this part of the case show clearly that the developer, D3, had become the registered lessee of Lot 2523 ('the said lot') whereon the plot concerned is situated. That lease was executed by the trustees of the Khoo Kongsi as registered proprietors in favour of D3, pursuant to cl 16 of the joint-venture agreement (exh AB1 at p 40) to which they were parties, for the purpose of proceeding with the development on the said lot. By the joint-venture agreement, D3 had undertaken to complete the entire scheme within eight years from the date of approval of the building plans whilst the trustees of the Khoo Kongsi had also undertaken to execute a 99-year lease in favour of purchasers of plots of land with buildings thereon in the housing scheme upon issue of separate titles thereto.

In these circumstances, it was unmistakably clear that D3's lease was held in trust and for the benefit of the Khoo Kongsi and itself for the purpose of proceeding with the development.

It follows that D3 derive their interest in the subject matter of the suit from the trustees of the Khoo Kongsi and so, statements made by the visiting trustees or supervisors of the Khoo Kongsi, which are admissions during the continuance of that interest, are admissible under s 18(3)(a) and (b), even though technically, the trustees of the Khoo Kongsi are not parties to this suit.

I further find that in all probability, the person who made the promises or assurances was in fact the visiting trustee and supervisor of the Khoo Kongsi. There is no reason to suppose that that person did not hold the office he purported to hold, for who else would be making such promises or assurances? And, it is significant that the defendants did not call whoever it was who held the office of visiting trustee at the material time, to contradict the testimony of P2 and PW1.

Thirdly, it was submitted that promises or assurances made by a visiting trustee would not be binding on the Khoo Kongsi because, according to the affidavit evidence of a trustee, Khoo Peng Tee (at pp 64–68 of exh BA1), and DW3, he had no power to make the same.

In answer to this submission, counsel for the plaintiffs relied on the doctrine of apparent (sometimes called ostensible) authority, under which a principal may be bound by the acts of an agent which he has not authorized and has even forbidden.

In particular, he pointed out that the Khoo Kongsi had held out the visiting trustee as having power to deal with their tenants on their behalf.

It will be recalled that both P2 and PW1 had testified that they had made a request to the visiting trustee for the transfer of the tenancy of dwelling house No 258K and the farm to P1 and P2 and that as a result, on his next visit, he had brought a letter for P1 and P2 to sign. This was done and later, that dwelling house was registered in the name of P1 and P2.

The doctrine of 'holding out', sometimes called apparent or ostensible authority, has been said to be based upon estoppel. (See *Rama Corp Ltd v Proved Tin and General Investments Ltd*;[33] *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd.*[34]) Agency by estoppel arises where one person has so acted — and this he may do by allowing the agent to hold himself out as having authority (see, eg *Re Henry Bentley & Co and Yorkshire Breweries Ltd, ex p Harrison*;[35] *Council of the Shire of Ashford v Dependable Motors Pty Ltd*[36]) — as to lead another to believe that he has authorized a third person to act on his behalf, and that other, in such belief, enters into transactions with third persons within the scope of his ostensible authority. The onus rests on the person dealing with the agent to establish real or ostensible authority (see *Pole v Leask*[37]). The conduct said to amount to holding out must be proved affirmatively (see *Bailey & Whites Ltd v House*[38]). It is a question of fact in a particular case whether ostensible authority existed for the particular act in respect of which liability is sought to be imposed upon the principal (see *Brazier v Camp*[39]).

In *Crabb v Arun District Council*,[40] Lord Scarman dealt with the approach of equity when the question of the authority of an agent to bind his principal arose for consideration. What he said was this [at p 875]:

> Nor do I think it necessary in a case such as this to enquire minutely into the law of agency. These defendants could, of course, only act through agents, but, as I have already made clear, from the very nature of the case, there would be no question of grant, no question of legally enforceable contract. We are in the realm of equity; and within that realm we find that equity, to its eternal credit, has developed an immensely flexible, yet perfectly clear, doctrine: see *ER Ives Investments Ltd v High* [1967] 2 QB 379 per Danckwerts LJ. The approach of equity, when there is a question of agency in a field such as this, must I think be a very simple one. It will merely be that, within reasonable limits, those to whom a defendant entrusts the conduct of negotiations must be treated as having the authority, which, within the course of the negotiations, they purport to exercise it.

Applying the principles enunciated in the above authorities, I am satisfied, having regard to the evidence, that the plaintiffs have succeeded in proving, on the balance of probabilities, that the visiting trustee was held out as having power to deal with the tenants on its behalf, including the power to make the promises and assurances aforesaid upon which the plaintiffs had relied and incurred substantial expenditure by the installation of a sprinkler system on the farm. They would hardly have done so if they were liable to be turned out by a mere one month's notice to quit.

Fourthly, I should like to consider the submission of counsel for the defendants that the alleged promises or assurances relied upon by the plaintiffs that they could continue and stay on the plot concerned as long as they liked or forever, so long as they paid rent, even if true, would invalidate the tenancy because, as he put it, 'A tenancy like all contracts requires certainty of terms. The term alleged by the plaintiffs renders the duration of the tenancy uncertain and therefore invalid.' (See *Karuppan Chetty v Suan Thian*[41] and *Prudential Assurance Co Ltd v London Residuary Body & Ors.*[42])

This branch of counsel's submission is directly related to another branch of his submissions which raises the question whether the availability of the alleged equity depends upon the availability of the remedy of specific performance, and so, for the sake clarity and convenience, I propose to deal with it under that subheading which follows immediately hereunder.

(i) Does the availability of the alleged equity depend on the availability of the remedy of specific performance?

'Yes,' said counsel for the defendants and he relied on the following passage in the judgment of Ong CJ in *Yong Tong Hong v Siew Soon Wah & Ors*,[23] at 107 col 1F:

> In the instant case the landlord's claim to re-possession is met by a counterclaim for specific performance. As Vaughan Williams LJ said in *Zimbler v Abrahams* [1903] 1 KB 577: 'If the defendant is entitled to specific performance, it follows he is not liable to be ejected'.

Similarly, he pointed out that when *Yong Tong Hong*'s case[43] went on appeal to the Privy Council, Viscount Dilhorne posed the question (at p 135 col 2I

last sentence), 'Is the respondent (the tenant) entitled to specific performance of that agreement?'

Counsel rounded off this part of his submissions, stressing that here the plaintiffs were not entitled to specific performance, presumably because the oral agreement relied upon by them, following the promises or assurances aforesaid, was bad for uncertainty, and moreover, that the plaintiffs had not even counterclaimed for specific performance.

In their excellent work on *Equity Doctrines and Remedies* (3rd Ed, 1992) at p 433 para 1728, Meagher, Gummow and Lehane, have an interesting commentary on the case of *Siew Soon Wah & Ors v Yong Tong Hong*.[43] What they say is this:

> As the law stands, even within the rubric of estoppel, there is scope for considerable confusion.
>
> The Privy Council decision in *Siew Soon Wah v Yong Tong Hong* is a striking example. There the father of the plaintiffs alledgedly agreed to let certain premises to the defendant in consideration not only of rent but also of a lump sum payment. The reversion was then transferred to the plaintiffs (whether for value and with notice does not appear clearly from the report on appeal or below [1971] 2 MLJ 105 at p 108) and they sought to eject the defendant; he counterclaimed for specific performance. The first issue was to determine whether there was any lease and whether it had properly been determined. The Privy Council, in finding for the defendant, held (a) the arrangement was not so vague and uncertain as to be void for uncertainty; (b) although there was no registrable instrument as required by the relevant legislation, the defendant had a counterclaim for specific performance which was a good answer to the claim of the plaintiffs: *Zimbler v Abrahams* [1903] 1 KB 577. That would appear quite sufficient to dispose of the case. But, Viscount Dilhorne for the Privy Council then went on ([1973] AC 836 at p 845) to cite *Inwards v Baker* [1965] 2 QB 29, and to restate his conclusion as that 'there rose in the (defendant's) favour an equity or equitable estoppel protecting his occupation...' because the defendant had paid the lump sum and rent thereafter in accordance with his alleged lease. This holding, as appears from the above, was unnecessary for the conclusion, and productive of confusion. For it has always been assumed that performance of contractual obligations cannot amount to self-detrimental conduct induced by the other party and thus raising an estoppel against him. The truth of the matter is that estoppel would have been relevant in this case only if their Lordships had held the arrangement void at law for uncertainty so that there was no agreement of which specific performance might be decreed. Granted there was such agreement, to add estoppel as a ground for decision is to supply a third wheel to the chariot.

It is difficult to find fault with the learned author's comments and I would respectfully concur in their view that the Privy Council, having found that the arrangement relied on by the tenant was not so vague and uncertain as to be void for uncertainty, and although there was no registrable instrument for the purposes of the National Land Code 1965 ('the Code') or its predecessor, the Land Code (Cap 138), the tenant had conterclaimed and so this was a sufficient answer to the landlords' claim for possession. Obviously, these findings were all that was required for the decision in favour of the tenant. Therefore, in going further and adding estoppel as a further ground for the decision, their Lordships, and in the court below, the Federal Court, were really supplying 'a third wheel to the chariot'. This

would appear to have been unnecessary and so, whatever was said on estoppel, would be obiter.

Be that as it may, counsel for the plaintiffs has pointed out that unlike *Siew Soon Wah*'s case,[43] where the court was asked to consider the validity of an agreement which was not registrable under the Code, in the present case, the court is not being asked to consider the validity of any agreement but the validity of a promise made by the visiting trustee of the Khoo Kongsi which led to the detrimental reliance on it by the plaintiffs. In other words, it was said that the defendants had failed to distinguish between the principles governing promissory estoppel and the law of landlord and tenant.

With these submissions of counsel for the plaintiff, I agree.

The argument that the principle of promissory estoppel enunciated in *Central London Property Trust v High Trees House Ltd*[44] should be confined to cases where the parties are contractually bound to one another, recieved short shrift in *Evenden v Guildford City Association Football Club Ltd.*[45] In that case, a groundsman was employed at the football ground at Guildford. For some years, he was employed by the supporters' club. Then he was transferred to the football club itself. The football club promised him that he would not suffer by the transfer. The question for decision was whether that promise was binding so as to entitle him to redundancy pay for the whole period? It was held that it was binding. Lord Denning said this [at p 924]:

> ... [P]romissory estoppel....applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act upon it and he does act upon it. That is the case here. Mr Evenden entered into his employment with the football club on the faith of the representation that he would not be prejudiced and that his employment should be regarded as a continuous employment. Acting upon it, he has lost any rights against the supporters' club. The football club cannot be allowed to go back on it. His employment is to be treated as continuous for the whole 19 years. He is entitled to the full redundancy payment of £459.

I recognize, however, that the doctrine of promissory estoppel provides a defence to an action on the original contract for a defendant relying on a voluntary variation. It does not provide a cause of action for a plaintiff relying on a gratuitous promise (see *Combe v Combe*[46]).

Yet, its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist (see *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*[47] at p 105 in CA and at pp 131–132]; for example, by giving rise to a binding obligation where none existed before (ibid at p 107). However, a promissory estoppel is not permanent in its effect. The case of *Ajayi v RT Briscoe (Nigeria) Ltd*[48] shows that a promissor may resile from his position upon giving the promisee notice — not necessarily formal notice — thus affording the latter a reasonable opportunity of resuming his previous position; and only if that is impossible does the promise become final and irrevocable. (See *Ajayi*'s case[48] at p 1330.) Donaldson J (as he then was) applied the principle of promissory estoppel in *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd*[49] when he said at p 847:

A Lord Cairns LC in his enunciation of the principle [in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439] assumed a pre-existing contractual relationship between the parties, but this does not seem to me to be essential, provided that there is a pre-existing legal relationship which could in certain circumstances give rise to liabilities and penalties.

B Evershed MR, in an article entitled 'Equity after Fusion: Federal or Confederate' (1948) 1 *Journal of the Society of Public Teachers of Law* 171 at p 176, observed of the *High Trees* case[44] that, 'It would appear to have established a right to the extent, but only to the extent, of a right to a specific remedy; namely, the remedy of an injunction to prevent the other party recalling his promise'.

C In the present case, D3 had counterclaimed for possession of the plot concerned, to which the plaintiffs replied, alleging that their possession was protected by an equity or equittable estoppel, and they have also prayed for an injunction restraining the defendants from carrying out work thereon.

The present case is really one where the plaintiffs and their forbears have
D been in possession of the plot concerned for decades and they have commenced these proceedings to protect their rights to remain in possession relying on equity or equitable estoppel. If they succeed in their plea, then what the court will have to consider is the extent of the equity and how best to satisfy it.

In the circumstances, the answer to the question posed above regarding
E this part of the case is that the plaintiffs' claim to the alleged equity does not depend on the availability of the remedy of specific performance.

(ii) Were the plaintiffs' tenancies binding on D1 and/or D3?

It was submitted by counsel for the defendants that the tenancies were not
F binding upon D1 and/or D3 on three separate grounds, namely:

(1) neither D1 nor D3 took over the tenancies;
(2) there was no attornment either by the demand or the acceptance of the rent from the plaintiffs; and
(3) the concept of privity of estate does not apply in this country by reason
G of s 6 of the Civil Law Act 1956, as privity of estate is part of land tenure.

It was argued that the rule in *Errington v Errington and Woods*[50] that 'neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice' had since been repudiated in
H England in *Ashburn Anstalt v Arnold*.[51]

Similarly, it was pointed out that *Lyus v Prowsa Developments Ltd*[52] was disapproved.

It was further argued that in the case of D3, a further consideration was its position as registered lessee under the lease dated 10 August 1983
I (AB2). It was emphasized that the protection as to indefeasibility applied also to registered lessees under s 340(1) of the Code and that the plaintiffs had not brought themselves within any of the exceptions to the indefeasibility rule, such as fraud within the meaning of the authorities discussed by me in the case of *Goh Hooi Yin v Lim Teong Ghee & Ors*;[53] in particular, the

following passage in my judgment in that case was cited: '... there is no fraud on the part of the registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest' (at p 32).

It was next submitted that, although fraud had not been alleged in the pleadings, P2 had, in her affidavit dated 7 June 1990 (exh BA1 at pp 161–173) filed in opposition to D3's summons to vary the injunction, made allegations of fraud and dishonesty, but that these allegations, even if true, did not constitute fraud in the sense sufficient to upset the title of a registered proprietor. More particularly, the allegations were these:

(f) The third defendant and the Khoo Kongsi are partners in a joint-venture agreement and it would be fraudulent, dishonest and reprehensible on the part of the third defendant to attempt to use the principle of indefeasible interests under the National Land Code 1965 to defeat the vested rights of the plaintiffs.

(g) Hence by reason of the aforesaid, at all material times, when the third defendant embarked on their joint-venture housing development, they had full knowledge of the plaintiffs' legal and equitable rights to the said land and cannot therefore pray in aid the doctrine of the bona fide purchaser for value without notice (at p 165 of exh BA1).

Furthermore, my attention was drawn to the plaintiffs' defence to D3's counterclaim and, in particular, that it had not alleged fraud but had by para 4 thereof, instead alleged that D3 was not a bona fide purchaser for value without notice. This, it was said, fell far short of the requirements for upsetting the title of a registered proprietor and this would include a registered lessee like D3.

In order to determine whether the submissions of counsel for the defendants regarding this part of the case are tenable, it is necessary to keep in the forefront of our minds, the background facts as to how the defendants in this case came into the picture. These facts, as to which there is no dispute, may for convenience, be taken in substance, from the written submissions of counsel for the plaintiffs and are as follows:

It was pursuant to cl 16 of the joint-venture agreement (exh AB1 at p 40) that D3 became the registered lessee of the said lot on 24 August 1983, whereon the plot concerned is located. The object of this exercise, according to a director of D3 in charge of the building work on the scheme, Ng Bock Tye (DW4), was to facilitate the development works thereon. This was understandable since the Khoo Kongsi was contractually bound to execute a 99-year lease in favour of purchasers of plots of land whereon dwelling houses were to be erected and similarly, D3 was, by cl 12, also contractually bound to complete the entire building scheme within eight years from the date of approval thereof.

In these circumstances, the irresistible inference is that D3's lease was held in trust for the benefit of the Khoo Kongsi and D3, for the purpose of facilitating development of the project.

By the same token, it may be said that D3 is, for purposes of the development, the alter ego of the Khoo Kongsi. It follows that D3 would be in no better position to resist the plaintiffs' claim to be entitled to be in possession in law and equity than would the Khoo Kongsi itself.

On a further ground also, the plaintiffs' equity would bind D1 and D3. D1 and D3 are admittedly sister companies of the Farlim Group, directly concerned in the development of the Thean Teik Estate, the property of the Khoo Kongsi and, it is not insignificant, that a trustee of the Khoo Kongsi, Khoo Kah Seng (DW3), is a director of both D1 and D3. Since the institution of this suit in 1982 and the plaintiffs' application for interlocutory injunctive relief, D1 and D3 have had notice of the plaintiffs' interest as this received considerable treatment in the pleadings and the affidavits. As successors-in-title with notice of the plaintiffs' interest in the plot concerned, D3 would have to take its lease subject to that interest. (See *Mok Deng Chee v Yap See Hooi & Ors*;[29] *Devi v Francis*.[54]) The validity of contracts relating to land or any interest therein is explicitly declared in s 206(3) of the Code. (Per Ong CJ in *Yong Tong Hong v Siew Soon Wah Ors*[23] at p 108 col 1G.) The position would be a fortiori having regard to my finding that D3 held the registered lease as the alter ego of the Khoo Kongsi.

I regret, therefore, that I am unable to accede to the interesting submissions of counsel for the defendants that the protection of indefeasibility guaranteed under s 340(1) of the Code enables D3 to take its lease free of the plaintiffs' interest in the plot concerned.

(iii) Proprietary estoppel

This brings me to a consideration of the submission advanced on behalf of the plaintiffs that they are entitled to rely upon the plea of proprietary estoppel.

Proprietary estoppel is one of the exceptions to the general rule that a person who spends money on improving the property of another has no right to claim reimbursement or any proprietary interest in property. (See, eg *Ahmad Yar Khan v Secretary of State for India in Council*.[55]) Unlike promissory estoppel, proprietary estoppel, when it operates, is permanent in its effect and it is also capable of operating positively so as to give a cause of action. (See *Denny v Jensen*.[56])

In *Ramsden v Dyson*,[57] estoppel by representation was considered in relation to cases in which a person builds on the land of another, the landowner standing by without asserting his rights. In his dissenting judgment, which is still considered the locus classicus on the subject, Lord Kingsdown said this:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, the court of equity will compel the landlord to give effect to such promise or expectation.

It was argued by counsel for the defendants on the authority of *Brinnard v Ewens*,[58] that for this sort of estoppel, four conditions have to be met:

(1) the claimant must have incurred expenditure or otherwise acted to his detriment;

(2) the claimants must have acted in the belief that they either owned or would obtain a sufficient interest in the property to justify the expenditure;
(3) the claimants' belief must have been encouraged by the landlord; and
(4) there must be no bar to the equity such as the contravention of any statute.

It will be recalled that the plaintiffs' claim to a proprietary estoppel is based on the expenditure of money by Cheong Au Pit on the Khoo Kongsi's land in the expectation or belief, encouraged by the Khoo Kongsi, that they could stay on the land and carry out their farming activities as long as they wished, provided that they paid the rent.

Having regard to the facts relied upon by the plaintiffs, upon which they based their claim to proprietary estoppel, counsel for the defendants contended that such a claim was untenable because, to quote his written submission:

> ... there is no basis for a proprietary estoppel or equity since:
>
> (a) the plaintiffs had made no mistake as to the title of the land; the deceased was a ground tenant and the plaintiffs were aware of the ownership of the land in the Khoo Kongsi; a mistake by the representee (known to the owner) and acquiescence in that mistake by the owner are essential; these are lacking in the present case; the promise must be supported by independent consideration apart from the obligation to pay rent; there is no evidence in this case of any such independent consideration, the decisive factor in the other cases in which the doctrine had been applied (usually by the payment of premium or 'tea money');
>
> See *Tan Khien Toong & Ors v Hoong Bee & Co* [1987] 1 MLJ 387; *Siew Soon Wah v Yong Tong Hong* [1973] 1 MLJ 133 (PC) affirming *Yong Tong Hong v Siew Soon Wah* [1971] 2 MLJ 105 (FC)*: Lee Lum Soh v Low Ngah* [1973] 1 MLJ 97.
>
> In *Siew Soon Wah*, Viscount Dilhorne adverted to this fact, with reference to the payment of the sum of $8,000 in that case (at p 135):
>
> 'In this case the respondent occupied the ground floor since February 1958 and paid rent therefor. In February 1958 he paid the sum of $8,000 to his landlord. He cannot have done that for a tenancy of short duration. It must have been paid in consideration of the tenancy described in the agreement of June 1964.' (Ibid 135 Right C–D).
>
> (b) The allegation of estoppel is not founded on what the deceased did but on what the plaintiffs did after the death of Cheong Au Pit; there must be reliance and detriment based on an inducement or encouragement by the Khoo Kongsi: *Imperial Bank of Canada v Mary Victoria* AIR 1936 PC 193.
>
> As to encouragement and expenditure, see *Siew Soon Wah v Yong Tong Hong* at pp 134–135 and *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86; *Mok Deng Chee v Yap See Hooi* [1981] 2 MLJ 321.

I regret that I cannot agree with the submission of counsel for the defendants that to establish proprietary estoppel, in cases where a person builds on or improves the land of another, the landowner standing by without asserting his rights while this was going on, it is essential to prove that such a person mistakenly thought that the land was his own when he did those acts, though I accept that in such a case, equity will treat the true owner's

A conduct as estopping him from subsequently asserting his title to the detriment of such person. I say so because even if such a person builds or improves the land of another knowing he was doing so on land belonging to another, there will still arise an equity in him if the landowner led such person to expect to be allowed to stay there. The case usually cited for this B proposition is *Inwards v Baker*[59] at pp 36–37, where a father owned land and invited his son to build a bungalow on it. This was done partly at the son's expense, and the son lived in the bungalow. When the father died, the title to the land passed, under a will made before the land was bought or the bungalow built, to the father's mistress and other children.

The Court of Appeal held that the son had a right to remain. Lord C Denning MR, speaking for the court, said [at p 36]:

> ... if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity ... even though there is no binding contract to grant any particular interest to the licensee, D nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable to do so ... I think that any purchaser who took with notice would clearly be bound by E the equity.

Inwards v Baker[59] was a case of active encouragement since the father there had persuaded his son to build the bungalow on the father's land but an equity would also arise where the landowner merely encouraged the builder's belief passively, as where the mortgagee stood silently by while a purchaser, F in ignorance of the mortgage, built on the land. (See *AG of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd*;[60] *Haslemere Estates Ltd v Baker*.[61]) 'The circumstances of looking on is in many cases as strong as using terms of encouragement' (per Lord Eldon in *Dann v Spurier*[62]).

I note that in both *Mok Deng Chee v Yap See Hoi & Ors*,[29] Salleh Abas G FJ (as he then was), speaking for the Federal Court, and Choor Singh J in the Singapore case of *Khew Ah Bah v Hong Ah Mye*,[63] applied the principle in *Inwards v Baker*[59] although in neither case was there any question of mistake. And, in *Siew Soon Wah v Yong Tong Hong*,[43] Viscount Dilhorne quoted with approval the following passage in the judgment of Lord Denning in *Inwards v Baker*,[59] 'All that is necessary is that the licensee should, at the H request or with the encouragement of the landlord, have spent the money in the expectation of having been allowed to stay there'.

Nor, for that matter, am I persuaded by counsel for the defendants that an independent consideration, for example, the payment of 'tea money' over and above the rent is an essential requirement for the operation of the doctrine of proprietary estoppel. The case to which I should like to refer I here is *Crabb v Arun District Council*[40] at p 871 where Lord Denning, speaking for the Court of Appeal, said this:

> Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights — *even though that promise may be unenforceable in point of law for*

> *want of consideration* or want of writing — and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise ... Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights — knowing or intending that the other will act on that belief — and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. (Emphasis added.)

Similarly, I am not persuaded that to raise an equity, it is essential that the representator must have knowledge that his property was being improved. The representator's conduct and the subsequent action and belief of the representee may render it unconscionable for the representator to insist on his strict legal rights. I am supported in this by the following passage in the judgment of Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co*[64] at p 915:

> Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

In this context, the case of *Shaw v Applegate*[65] at pp 970 or 977–978 merits reading.

(iv) Proprietary estoppel compared with constructive trusts

I might as well add that the principles of estoppel have, on various occasions, been compounded with those governing constructive trusts. (See, eg *Grant v Edwards*[66] at p 657; *Gillies v Keogh*[67] at p 330; *Lloyds Bank Plc v Rosset*[68] at p 132.)

Indeed, the principles which apply to constructive trusts are closely akin to those underlying the doctrine of proprietary estoppel. In both, the claimant must have acted to his detriment in reliance on the belief that he would obtain an interest. (See *Grant v Edwards*,[66] *Lloyds Bank v Rosset*[68] at p 877.) In both, equity acts on the conscience of the legal owner to prevent him from defeating the common intention. (See *Grant v Edwards*[66] at p 656; *Maharaj v Chand*[69] at pp 907–908; *Re Basham (decd)*[70] at p 1504.)

I therefore hold that in some cases — and the plaintiffs' case is such a case — proprietary estoppel is a form of constructive trust. (See *Re Basham (decd)*[70] at p 410.)

This is yet another ground for not acceding to the submission of counsel for the defendants regarding this part of the case.

(v) What is the extent of the equity which arises in favour of the plaintiffs?

Having found that the plaintiffs' occupation of the plot concerned is protected by an equity, the next question for decision is, what is the extent of that equity?

The cases of *Griffiths v Williams*[71] and *Jones (AE) v Jones (FW)*[72] at p 443, indicate that the extent of the equity is to have made good, so far as may fairly be done between the parties, the expectations of A which O has encouraged. The maximum extent of the equity being A's expectation or belief. (See *Dodsworth v Dodsworth*[73] at pp 1115 and 1117.)

In the present case, the interests of third party purchasers must be taken into account. As Denning MR put it in *Crabb v Arun District Council*,[40] at p 189, in its search for the 'minimum equity to do justice' to A and shaping it to the facts of the case, 'equity is displayed at its most flexible'. Or, as the Privy Council put it in *Plimmer v Wellington Corporation*,[74] '... the court must look at the circumstances in each case to decide in what way the equity can be satisfied'.

(vi) How is the equity to be satisfied or, in other words, what are the remedies available?

The reports show a wide variety of solutions reached in cases in which a person has expended money on the property of another.

In *Inwards v Baker*,[59] it will be recalled that the Court of Appeal held that despite the legal title being in the plaintiffs, the son had an equity to remain in the bungalow 'as long as he desired to use it as his home'. Dankwerts LJ observed, 'equity protects him so that an injustice may not be perpetrated'. In *ER Ives Investment Ltd v High*,[75] the court held that Mr High and his successors had an equity which could only be satisfied by allowing him to have a right of access over the yard, 'so long as the block of flats had its foundations on his land'. Accordingly, the plaintiffs were refused an injunction to restrain the defendant from exercising a right of way across the former's land.

In *Siew Soon Wah & Ors v Yong Tong Hong*,[43] the Privy Council held that there was an equity or an equitable estoppel protecting the defendant in his occupation for 30 years.

In *Bank Negara Indonesia v Philip Hoalim*,[76] we see the Privy Council holding that, notwithstanding the fact that the defendant had no protection under the Control of Rent Ordinance 1953, he had an equity to remain 'so long as he continued to practise his profession'.

In other cases, the court may give relief to the person who has incurred the expenditure on another's land by giving him an equitable lien on the property for his expenditure (see *Raffaele v Raffaele*,[77] discussed by EE Allan (1963) 79 LQR 238) or for the value of his improvements (see *Neesom v Clarkson*[78]), in which event he will be treated as a mortgagee in possession. (See *Neesom v Clarkson.*[78])

However, the court has been known to make an order for possession against the person who has made the improvements conditional upon the

landowner repaying the cost of those improvements. (See *Dodsworth v Dodsworth.*[73]) A

On the other hand, if the evidence showed that the prejudice suffered by the person who made the improvements had been fully satisfied or, in other words, that he already had 'sufficient satisfaction' for his expenditure, he will obtain no further relief. (See *AG v Balliol College Oxford*[79] at p 412 — expenditure by lessees.) B

In the present case, on the extent of the equity, counsel for the plaintiffs refocussed the attention of this court on the following:

During his lifetime, and just before his death, Cheong Au Pit had given house No 258K to P1 and P2 and the vegetable land to the plaintiffs and PW1. Thus, Cheong Au Pit's equity in house No 258K devolved upon P1 C and P2 and his equity in the vegetable land upon the plaintiffs and PW1. Subsequently, in 1972, the Khoo Kongsi had represented to P2 that she could stay on the plot concerned and continue farming as long as she wished, provided she paid rent. It was said that this representation amounted to a tenancy for as long as the law would permit.

This last point has no doubt been inspired by the judgment of Ong CJ, D speaking for the Federal Court, in *Yong Tong Hong v Siew Soon Wah*[23] at p 108, where a question arose as to what effect should be given to a clause in a tenancy agreement — not a proper instrument for registration as a lease under the Code — the clause being 'the tenancy shall be permanent' or, in the words which fell to be decided by the trial judge, 'for so long as the E tenant wished to occupy', no distinction being drawn between these words and the clause concerned, Ong CJ then concluded (at p 108 col 1F–G) that no strain would be imposed upon the powers of the court to give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allowed, which by s 221(3)(b) of the Code, in the case of a lease of part only of alienated land, was 30 years. F His judgment was affirmed by the Privy Council on identical grounds.

Counsel therefore suggested that the appropriate remedies for the plaintiffs were these:

Since the plaintiffs were occupying the plot concerned and this comprised only a portion of the land, the extent of their equity was a lease for 30 years G commencing in 1972 when the representation was made by the visiting trustee of the Khoo Kongsi. Accordingly, an injunction should be granted to restrain the defendants from trespassing on the plot concerned.

Alternatively, if the court were of the view that D3's counterclaim for possession should be allowed and that the plaintiffs must yield vacant possession of the plot concerned to D3, then this should be made subject H to the payment of compensation to the plaintiffs on the basis of their entitlement to a 30-year lease. This award being quite separate and apart from what may be awarded to the plaintiffs for damages for trespass and nuisance.

On the other hand, counsel for the defendants contended that, if contrary I to his primary submission, the court holds that D3 was bound to satisfy the plaintiffs' alleged equity, then having regard to the facts, the plaintiffs were not entitled to make any claim because the court would have to take into consideration the length of the plaintiffs' occupation of the plot concerned,

A the rate of rental, the period in respect of which rents were not collected; no rents having been collected since the expiry of the notice to quit dated 30 June 1982 in respect of the two dwelling houses and since 20 July 1982 in respect of the vegetable land and, finally, the fact that the entire families of the plaintiffs and their ancestors had been living on the plot concerned for decades.

B On the question of the quantum of compensation to be awarded, my attention was directed by counsel to the following passage in the judgment of the Federal Court in *Kalimuthu v S Kandiah*,[80] at pp 221–222, which he considered most apposite:

> C Assuming that the defendant is entitled to compensation, what should be the amont of such compensation? The defendant stated in evidence that on moving into the house he had it renovated and did minor repairs to it which cost him $6,000. He produced no other evidence to support this assertion. The plaintiff's evidence was that when she first saw the house it had zinc roof and plank walls and that apart form minor repairs the structure remained the same. The defendant has lived in the house since 1962. Since 1965, that is for more than 11 years D now, he has not paid any ground rent or assessment. This works out at a total of more than $3,500. I do not think the house itself together with minor repairs would have cost the defendant or his father anything more than that. I believe the ends of justice will be met if he is not required to pay arrears of ground rent and assessment and not awarded any compensation, but think he must be given a bit of time to give up vacant possession.

E Counsel pointed out that the plaintiffs had not adduced any evidence or, for that matter, even alleged what the cost of construction of the two dwelling houses was when they were erected . He suggested that the relevant date for assessing damages under this head would be not the present date but the date of construction. He added that if the present date were adopted as the F relevant date for the assessment of damages, then there was an acute conflict of evidence as to the value of the dwelling houses and, furthermore, there was no evidence that the plaintiffs could not reuse the materials after the dwelling houses are dismantled.

In my view, generally speaking, a solution which says that the person G making the expenditure or the improvement on another's land is to have everything or nothing may rightly be described neither right nor fair and would also be clumsy and unsuitable. The correct approach should therefore be to protect that person against interference for long as he would be prejudiced thereby. The reports contain many examples where such an approach was adopted and I need no more than refer to a few.

H In *Inwards v Baker*,[59] for instance, the son was protected in his occupation and could remain in the bungalow 'as long as he desired to use it as his home', despite the legal title being in the plaintiffs. In *Ward v Kirkland*,[81] Ungoed Thomas J granted an injunction to restrain interference with the exercise of a right of way in preference to granting an easement and in *ER Ives Investment Ltd v High*,[75] a right of way exercised in circumstances giving I rise to an estoppel, was held not to be an easement at law or in equity but enforceable, without registration, against a purchaser with notice.

In the present case, having regard to its history, not forgetting the acrimony generated by the dispute and which still persists in plenty, I do

not consider that the negative protection illustrated by the cases cited in the preceding paragraph would be appropriate; a final solution of the parties' rights according to the justice of the case would be needed.

More particularly, having regard to the fact that the plaintiffs and their ancestors have been living on the plot concerned and cultivating the vegetable land for the planting of vegetables and fruit trees on which they had also reared pigs and poultry for commercial purposes, and the substantial sums of money which must have accrued to them and their ancestors by way of profit thereby over a period of several decades, and the further fact that the plaintiffs have enjoyed rent-free occupation for the last decade or so, I consider that the plaintiffs have had 'sufficient satisfaction' for their labour and expenditure on the plot concerned or, in other words, the prejudice suffered by them has been fully satisfied, and so, they are entitled to no relief. (See *AG v Baliol College, Oxford*,[79] per Lord Hardwicke.)

This means that *if*, but only if, I am wrong in my conclusion regarding issue two which, it will be recalled, raised the question: 'What notice to quit was necessary to determine the plaintiffs' tenancies of the farm and the two dwelling houses, assuming such tenancies were not coupled with an equity?', so that the notices to quit, each of one month's duration, given by the solicitors of the Khoo Kongsi, were, contrary to my primary view, sufficient to determine the tenancies of the two dwelling houses and the farm, then the plaintiffs and all those claiming possession or in occupation under or through them must quit, vacate and yield vacant possession of the plot concerned, dwelling house No 259H and the farm (but not dwelling house No 258K which I have held is subject to the Control of Rent Act 1966), to D3 without the payment of any compensation by D3, and I consider that a reasonable period for them to do so would be three months and I so order.

For the avoidance of doubt, I hasten to add that the question of the plaintiffs' entitlement to compensatory and exemplary damages for trespass are separate issues which are dealt with later in this judgment.

However, D3 is not entitled to claim any damages, whether general or special, from the plaintiffs in respect of their occupation of the plot concerned because, their occupation having been protected by an equity or equitable estoppel, they could in no way be regarded trespassers. Moreover, D3's claims for liquidated damages for late delivery of houses sold to third parties and for increased costs were all losses which were self-induced. It follows, that prayers (b) and (c) of D3's counterclaim are dismissed.

Again, for the avoidance of doubt, I hasten to add, that in the event of there being no appeal to the Supreme Court from my judgment, then this part of my judgment, all of which relates to issue three and concerns the questions of equity or equitable estoppel, the extent of the equity and how it should be satisfied, concluding with the possession order made against the plaintiffs in favour of D3 (except for dwelling house No 258K which I have held is subject to the Control of Rent Act 1966), is really an alternative judgment and will not arise for consideration and, indeed, must be disregarded altogether, having regard to my conclusion on issue two which relates to the question of the sufficiency of the notice to quit, which I had determined in favour of the plaintiffs.

A It follows that this part of my judgment which relates to issue three, will only operate and require consideration in the event of an appeal to the Supreme Court by the defendants, and I am found to be wrong regarding issue two and, in so far as dwelling house No 258K is concerned, I am also wrong that it is subject to the Control of Rent Act 1966.

B *Issue four — trespass and nuisance*

I have already decided the issue herein as to the area of the plot concerned, being issue one, in favour of the plaintiffs. Similarly, I have already found in favour of the plaintiffs as regards the locus standi objections; namely, the C title of the plaintiffs to maintain the present suit, including the claim for damages for alleged trespass arising out of the acts of D1 and D2 on 18 June 1982 and D3 and D4 on 17 March 1988.

(i) Did PW1 consent to D1 taking possession of the area etched black in P14 and levelling it in consideration of the payment of RM1,000?

D I must next consider the question whether Cheng Lye Hiang (PW1) had agreed to accept RM1,000 to allow D1 to take possession and level the area etched black in P14 whereon were vegetable beds planted by the plaintiffs.

It was the case for the defendants that PW1 had in fact so agreed. The only witness called by the defendants in this regard, was the testimony of E the development officer of D1 and D3, Goh Huay Guan (DW1). He testified that he had, on 18 June 1988, negotiated with Cheng Lye Hiang (PW1), who, it will be recalled, is the sister-in-law of P1 and P2, and that as a result, PW1 had agreed to accept RM1,000 to allow D1 to take possession and level the area etched black in P14. There was also an F affidavit by the predecessor of DW1, a certain Chern Eng Hock (not called at the trial), generally alleging such a settlement.

At this point, I might as well interpose to make my finding regarding the accuracy of P14 which purports to show the extent of the damage caused by the alleged trespass by D3 and D4 on 17 March 1988.

It was contended by counsel for the defendants that P14 was virtually G worthless as evidence, as its author, Lim Yee Juan (PW2), a research officer of the Consumers' Association of Penang, had been to the site only once and that was on the date of the alleged second trespass, to wit, 17 March 1988, that P14 was prepared by him based on information provided by PW1 whose source of knowledge was itself questionable.

H I regret I find this attack on the reliability of P14 unacceptable. I accept the testimony of PW1 as to the circumstances under which he prepared P14 and that it reflects what he saw at the vegetable land on the morning of 17 March 1988 when bulldozers of D3 and D4 were engaged in levelling work thereon. In other words, I believe him when he says that he saw the demolition of some structures and the levelling of the plaintiffs' vegetable I land and that he had taken photographs of these events. It was but natural for him to be assisted by PW1, who was on the site at the time, in the preparation of a rough sketch of the structures and the vegetable land.

It follows, therefore, — and I so find — that P14 accurately reflects the extent of the damage caused by the bulldozers of D3 and D4 on 18 March 1988.

I must now return to consider the question whether, in fact, PW1 had agreed to accept RM1,000 to allow D1 to take possession and level the area etched black in P14, as alleged by the development officer of D1, Goh Huay Guan (DW1), and his predecessor, Chern Eng Hock, in his affidavit.

Counsel for the plaintiffs has painstakingly set forth particulars of the inherent improbabilities and infirmities in the testimony of DW1, as well as the inconsistencies which appear upon a comparison being made between the testimony of this witness and the affidavit of Chern Eng Hock at pp 62 and 63 of his written submissions. I have given careful consideration to these criticisms, not forgetting what had been alleged by counsel for the defendants in this regard.

It would be tedious and unnecessary for me to recapitulate these rival contentions and I need no more than say that I would uphold the contentions of counsel for the plaintiffs and adopt, as my own, his reasons therefor.

I therefore find as a fact, that PW1 never agreed to accept RM1,000 or any other sum, as consideration for allowing D1 to take possession and level the area etched black in P14, whereon were the vegetable beds planted by the plaintiffs and so I find that the testimony of the development officer, Goh Huay Guan (DW1), and the affidavit of Cheng Lye Hiang on this point are unacceptable.

(ii) Did D3 and/or D4 by their servants or agents cause the damage on the plaintiffs' vegetable land on 21 August 1988 ?

I must next consider Goh Huay Guan's denial that on 21 August 1988, neither D3 nor D4 had levelled the plaintiffs' vegetable land or destroyed the plaintiffs' vegetable beds thereon and his claim that D3 and D4 had instead been working on one Khoo Bak Chun's land on that day.

Counsel for the plaintiffs has castigated this part of Goh Huay Guan's testimony as a blatant lie for reasons he has set forth at paras 1 and 2, at p 65 of his written submission.

After considering these criticisms levelled against Goh Huay Guan's testimony, again not forgetting the submissions of counsel for the defendants, I agree with counsel for the plaintiffs that the testimony of this witness has left too many questions unanswered (enumerated at p 65 para 2 of the plaintiffs' written submission) and the answers to these questions are supplied by the comment that most probably, DW3's testimony here is really an afterthought to justify violation of the interlocutory injunction granted by this court in favour of the plaintiffs to preserve the status quo pending the final determination of this suit, and I so find.

I therefore have no hesitation in finding as a fact that it was the servants or agents of D3 and D4 who, on 21 August 1988, had levelled the plaintiffs' vegetable land and destroyed their vegetable beds thereon.

(iii) The conflicting photographic evidence

My attention was also drawn to the conflicting photographic evidence adduced by both sides which I should like now to touch on briefly.

According to the testimony of the development officer of D1 and D3, Goh Huay Guan (DW1), as at 18 June 1982, there were only five beds with vegetables growing on the plaintiffs' vegetable land and he produced the photograph D22 in support. But, D22 evidently shows only a portion of the plaintiffs' farm and so is misleading.

On the other hand, the photographs produced by the plaintiffs, namely, DB(P) 2(a), 2(b), 2(c), 3(a), 3(b) and 3(c), which I find as a fact were taken by the sister-in-law of P1 and P2, Cheng Lye Hiang (PW1), and do show the whole of the vegetable lands on the plaintiffs' farm just before the trepass on 18 June 1982, present a very different aspect. I was reminded by counsel for the plaintiffs that these photographs had in fact been exhibited to the affidavit of P1 and P2 filed on 21 June 1982 during interlocutory proceedings, and yet neither D1 nor D2 had, at that time, disputed their authenticity or accuracy, nor did they then produce D22 by way of contradiction. These are considerations which, by themselves, certainly give rise to a suspicion regarding the testimony of DW1 and went further to undermine his credibility. That suspicion has been confirmed at the end of the day, when I had to assess his credibility and reliability.

Looking back, so far as this part of the case is concerned, I am amply satisfied that the plaintiffs have proved on the balance of probabilities that:

(1) at all material times to this suit, the plaintiffs were and are in lawful possession of the plot concerned being the portion etched yellow in exh P16 and having an area of approximately 121,000sq ft (or 2.8 acres) and including the farm, the two dwelling houses and the structures erected thereon;

(2) on 18 June 1982, both D1 and D2 had, by their servants or agents, committed acts of trespass and nuisance on the portion of the plot concerned, being the area etched black in exh P14;

(3) on 17 March 1988, D3 and D4 had, by their servants or agents, committed acts of trespass and created a nuisance on the portion of the plot concerned, being the area etched orange in exh P14, and have been in unlawful occupation of the portion of the plot concerned being the area etched black in P14; and

(4) on 21 August 1988, both D3 and D4 had, by their servants or agents, committed further acts of trespass and nuisance on the plot concerned by levelling the plaintiffs' vegetable land and destroying the vegetable beds thereon.

(iv) The quantum of compensatory damages

Now, those being my findings of fact on the issue of liability, and they are findings in favour of the plaintiffs in respect of both trespass and nuisance, I must now address the question of the quantum of damages.

The general rule as to the measure of damages, a rule equally applicable to tort as to contract, was defined by Lord Blackburn in *Livingstone v Rawyards Coal Co*,[82] at p 39 in these terms: 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation'.

In *Munnelly v Calco*,[83] Henchy J said, at p 399:

> ... the particular measure of damages allowed should be objectively chosen by the court as being that of the particular case, to put the plaintiff fairly and reasonably in the position in which he was before the damage occurred, so far as pecuniary awards can do so.

Before I proceed to assess the quantum of damages, I would remind myself of certain other well-established principles which I should keep in the forefront of my mind in considering this part of the case.

First, when a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable.

Secondly, I would refer to what Lord Goddard said in *Bonham-Carter v Hyde Park Hotel Ltd*,[84] at p 178:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

Thirdly, on the quality of evidence expected of a plaintiff, it is necessary to remember what Devlin J (as he then was) said in *Biggin & Co v Permanite*,[85] at p 438, namely, that where precise evidence is obtainable, the court naturally expects to have it; where it is not, the court must do the best it can. Nevertheless, it remains true to say that that generally, difficulty of proof does not dispense with the necessity for proof. (See *Aerial Advertising Co v Batchelors Peas (Manchester)*[86] at p 796 per Atkinson J.) The case of *Ashcroft v Curtin*[87] illustrates this point, for there the plaintiff, claiming for diminution of profits of his one-man business, failed in his claim despite the evidence pointing to a decrease in the company's profitability due to the injury, the records relied on being too rudimentary and the accounts too unreliable to quantify the loss.

(v) Claims for compensatory damages arising from trespass on 18 June 1982

I must now consider the plaintiffs' claims arising out of the trespass committed by D1 and D2 on 18 June 1982. The sister-in-law of P1 and P2, Cheng Lye Hiang (PW1), has testified on the loss suffered by the plaintiffs as a consequence of this trespass as follows:

	RM
(1) Loss of vegetable and fruit trees	4,900
(2) Loss of water piping system and motor pump	3,500

(3) Loss of income for area etched black in exh P14 at the rate of RM1,500 per month from July 1982 to February 1988 102,000

As to item (1), counsel for the defendants has submitted that 'there is no evidence of the vegetable and fruit trees grown on the main vegetable plot ...'. But this submission overlooks the defendants' own photographic evidence, being D26, which indicates a thriving farm. There is also the testimony of the sister-in-law of P1 and P2, Cheng Lye Hiang (PW1), on this point which I accept in preference to that of the development officer of D1 and D3, Goh Huay Guan (DW1), who testified that there were only a few rows of planted vegetables whilst the rest were empty. The impression made upon me by DW1 was that he was not a witness of truth.

In my view, so far as this branch of the plaintiffs is concerned, the court should not expect precise evidence and it must do the best it can. I do not consider this claim in any way unreasonable or excessive and I therefore hold that the plaintiffs are clearly entitled to the sum of RM4,900 in respect of the loss of the vegetables and fruits trees caused by D1 and D2's trespass on 18 June 1982.

As to item (2), the plaintiffs have claimed RM3,500 for the loss of the water piping system and motor pump. It is true that no receipt was produced in support but the plaintiffs had no cause to keep a receipt of this sort. On the evidence, I do not consider this claim in any way excessive, and so I hold that the plaintiffs are also clearly entitled to the sum of RM3,500.

As to item (3), being the plaintiffs' claim for loss of income derived from the farm in respect of the area etched black in P14 at the rate of RM1,500 per month from July 1982 to February 1988 amounting to RM102,000, the evidence relied upon by the plaintiffs to prove this branch of their claim came from Cheng Lye Hiang (PW1), who, it was said, had been working on the farm since she was ten years of age. I accept that she was and I also accept that by reason thereof, it could be reasonably presumed that she was familiar with the farming practices and the prices of the vegetables, pigs, chicken and fruits concerned.

She testified under cross-examination that her estimate of the loss of income was based on rates provided by the Thean Teik Residents' Association.

It was contended by counsel for the plaintiffs' that her testimony was supported by that of an agronomist attached to the University Science Malaysia, Dr Kam Suan Peng (PW3), who was called as an expert witness to prove the extent of the loss of their income.

There can be no room for a shadow of doubt that PW3 was an agronomist of high repute and integrity. I accept that her whole purpose in testifying was to assist the court in doing justice in this case.

But, having said that, it is necessary to probe the basis of her conclusions regarding the plaintiffs' claim for loss of income from the farm.

It was clear that Dr Kam's testimony was based upon data obtained from her own study of 12 farms in Thean Teik Estate, not including the plaintiffs' farm, but similar to it. She had also considered a study of Thean Teik farms made by the Penang Development Corporation and found that the results

of her own study corresponded with those of the Penang Development Corporation study which she admitted was more comprehensive than her own.

Having said that, it must be recognized that in making their claims for damages for loss of income, the plaintiffs were making three assumptions or impliedly relying on three propositions, namely:

(a) that they had a market for the fruits and vegetables concerned;
(b) that this market had been properly proved; and
(c) that this market value of the fruits and vegetables concerned was the proper basis for an award of damages under this head.

In my view, propositions or assumptions (a) and (b) were mistaken because they were never proved.

The normal way or method of proving market value in the case of a resale of goods in bulk would be to call the customers, or at the least, where the parties agree to documentary evidence, to tender documents showing the existence of and a dealing with customers. In the case of a (say wholesale) distribution to several customers, a plaintiff would be expected to adduce in evidence, books or documents showing that he had a business in the course of which he might reasonably have distributed these goods and the price he would have obtained. The plaintiffs in this case, did none of these things; they produced no business books or accounts or documents showing the existence of and a dealing with customers. Nor, for that matter, did they produce any income tax returns but I do not place undue stress on this point because persons in the position of the plaintiffs may prefer not to do so even though their earnings may attract income tax.

In other words, what I am saying is that a plaintiff's unsupported assertion that he would receive such and such a price for his fruits or vegetables does not prove market value, much less that he had a market. It must be proved aliunde, that is to say, in order to prove that a plaintiff would have got such and such a price for the fruits or vegetables, the natural thing to do would be to call the man who would have paid the price.

To say that it would be sufficient for a plaintiff to prove market value and that he had a market by merely just saying that 'I could have sold my fruits and vegetables at such and such a price', would, at least in a case where a substantial claim is being made, as in the present case, dispense with proof of quantum altogether.

That being so, I do not consider that the expert testimony of Dr Kam can redeem the weakness in the proof offered by the plaintiffs of the alleged loss of income, since her testimony, which is really theoretical, cannot serve as a substitute for the proof required to establish that there was a market for the fruits and vegetables and that the plaintiffs had a market along the lines I have indicated.

It follows, therefore, that while I am satisfied that the plaintiffs have demonstrated the fact of damages in regard to their claim for loss of income, I do *not* consider that they have adduced sufficient evidence as to its amount.

That, however, does conclude the issue, because the defendants had themselves adduced evidence of the results of a socio-economic survey

A conducted by the district office of the North East District, Penang, on behalf of the Tripartite Committee, whose members were representatives of the State Government of Penang, the developers and the Thean Teik Estate Residents' Association, contained in the report (exh D53), which counsel for the defendants himself urged could not be ignored as it came from an independent source (see para 23.7 at p 50 of his written submission). I would treat this as an *admission* on the part of the defendants that the plaintiffs' monthly family income from the farm at all material times to this suit, was correctly reflected therein and was as follows:

		RM per month
P1		450
P2		450
P3		420
PW1's children:	Cheng Choon Leng	280
	Cheng Choon Hok	430

In the absence of sufficient evidence adduced by the plaintiffs as to the extent of the loss of their income by reason of what the defendants did, I consider that I am entitled to rely on D53, put in by the defendants, which counsel for the defendants had urged could not be ignored, and which I would treat as a document, the contents of which are admitted by the defendants at least impliedly, if not expressly.

I do not consider that the plaintiffs are entitled to sue for the recovery of loss of income suffered by PW1 or her children. Nor, for that matter, would PW1 or her children be entitled to any such award as they are not parties to this suit. The plaintiffs' claim, so far as this part of the case is concerned, must be confined to loss of income suffered by P1 and P2 only, they being the two surviving plaintiffs.

Accordingly, I would award in favour of P1 and P2 and against D1 and D2, in respect of loss of income for the area etched black in P14, for the period from July 1982 to February 1988, at the rate of RM900 per month, the sum of RM60,300 to be apportioned between P1 and P2 having regard to their respective incomes aforesaid.

(v) Claims for compensatory damages arising from trespass on 17 March 1988

I next turn to consider the plaintiffs' claim arising out of the trespass committed by D3 and D4, by their servants or agents, on 17 March 1988.

PW1 had also testified on the loss suffered as a consequence of this trespass as follows:

	RM
(1) Loss of vegetables	3,000
(2) Loss of fruit trees	18,000
(3) Loss of pigsties, chicken coops, well, utensils and structures	40,050
(4) Loss of sprinkler system	12,000
(5) Loss of farm income at the rate of RM5,100 per month from April 1988 and still continuing (44 x RM5,100)	224,400

As to item (1), being the claim for loss of vegetables amounting to RM3,000, the court should not, I think, expect precise evidence and it must do the best it can. I do not consider this claim in any way unreasonable or excessive and I therefore hold that the plaintiffs are clearly entitled to this sum of RM3,000.

As to item (2), being the claim for loss of fruit trees amounting to RM18,000, for the same reasons I have given for allowing the claim in respect of item (1), I would also hold that the plaintiffs are clearly entitled to this sum of RM18,000.

As to item (3), being the claim for loss of pigsties, chicken coops, well, utensils and structures, amounting to RM40,050, here again I do not think the court should expect precise evidence and it must therefore do the best it can.

It was contended by counsel for the defendants that the chicken coops, pigsties, and other structures were in a ruinous state and should not therefore be compensated. In support of the contention that the structures were in a ruinous state, my attention was directed to certain photographs taken in 1990 by representatives of the defendants (see exh DAB at p 6; photographs at pp 7A, 7B and 15A; exh AB2 at pp 96N and 96O, D25A, D25C and D25D, which depict abandoned pigsties and exh DAB photographs at pp 8A and 8B; and exh AB2 at pp 95L, 96M and 96O which depict three dilapidated and abandoned chicken coops).

On the other hand, it was contended by counsel for the plaintiffs that the plaintiffs had discontinued their livestock rearing sometime in 1985 as a direct consequence of the defendants' acts of trespass, and so, it was but natural for the structures concerned to have become dilapidated due to disuse. With this submission I agree.

It is necessary to examine the conflicting evidence adduced by the parties regarding this particular claim.

For the plaintiffs, there was the testimony of PW1 as to the value of the items concerned, meaning their present value. Her testimony on this point was, to some extent, supported by the testimony of a contractor cum carpenter, Song Ah Bah (PW4).

It was pointed out by counsel for the plaintiffs that this witness had as much as 30 years' experience in the construction field, in particular, in building houses, chicken coops and pigsties, and that he had visited the plaintiffs' farm and had personal knowledge of the structures and building thereon. His estimates were based on what he considered were current costs of material and labour.

Song Ah Bah had estimated the current cost of construction of the three chicken coops to be RM12psf. PW1 had testified that one of the chicken coops was 8ft x 16ft, so the cost of reconstruction of this one at that rate, would be RM1,536 whilst the other two were, she said, each 8ft x 12ft, so that the cost of reconstruction of these two would be RM2,304. So the aggregate cost of construction of these two chicken coops would be RM3,800.

Song Ah Bah had also estimated the current cost of construction of the two pigsties at RM12 psf. PW1 had testified that each pigsty was 25ft x 75ft. So, at this rate, the aggregate cost of construction of these two pigsties would be RM22,500.

Song Ah Bah had further estimated the current cost of construction of the storehouse shown in photograph 6(a) in exh DAB, with a cement floor, zinc walls and zinc roof at RM10psf whilst the cost of construction of the other storehouse shown in photograph 6(b) in exh DAB with the asbestos roof but with no walls and just an earth floor would be RM7psf.

PW1 had testified that the first mentioned storehouse was 12ft x 8ft, so that the cost of construction at that rate would be RM960 (10 x 12 x 8) whilst the other storehouse was, she said, 15ft x 24ft, so that the cost of construction of this one would be RM2,520 (7 x 15 x 24).

For the defendants, there was the testimony of a chartered quantity surveyor, Saw Soon Kooi (DW5), who gave his own opinion as to the replacement costs of the structures and buildings concerned. He tendered his report exh D54 (paras 4.3–4.5) which said this:

> 4.3 I was shown photographs of a pigsty, identified by the defendants' solicitors to me as exh DAB, photographs at pp 7A, 7B and 15A; exh AB2 at pp 96N and 96O and D25A, D25C and D25D. These photographs depict an abandoned pigsty. In my professional opinion, the cost of building a new pigsty, as shown in these photographs with its floor, troughs and partitions being made of concrete and the roof made of asbestos sheet, would cost about RM6.50psf.
>
> 4.4 I was shown photographs, identified by the defendants' solicitors as exh DAB at p 8B and exh A2 at p 95K, which depict what appears to be a storehouse. In my professional opinion, the cost of erecting a similar storehouse with an earthen floor would be RM5psf.
>
> 4.5 I was shown photographs, identified by the defendants' solicitors as exh DAB at pp 8A, 8B and exh AB2 at pp 95L, 96M and 96O, which depict three dilapidated and abandoned chicken coops. In my professional opinion, the cost of building a similar chicken coop would not exceed RM4.50psf.

I must now choose between the conflicting expert opinion evidence adduced by the parties regarding this part of the case.

It is true that in terms of qualifications, there is obviously no comparison to be made between Song Ah Bah and Saw Soon Kooi. The former is a small time contractor cum carpenter in the position of a mere petty trader who has made no special study of the subject he was testifying about, whilst the latter is a quantity surveyor, and therefore, in the position of a professional man. But must I, on account of that alone, look askance, at the testimony of Song Ah Bah? I think not.

It must be recognised that the valuations being made here by these two witnessess, concern the replacement costs of chicken coops, pigsties, and storehouses. In this field, Song Ah Bah claimed, without challenge, that he had some 30 years' experience whilst Saw Soon Kooi made no claim to having any experience relevant thereto. With respect, it does appear to me, therefore, that there is substance in counsel for the plaintiffs' criticism of Saw Soon Kooi's opinion as being impressionistic.

Having seen them both testify, I prefer the testimony of Song Ah Bah to that of Saw Soon Kooi, regarding this part of the case. However, I am not prepared to go all the way and accept the testimony of Song Ah Bah in toto, as I think, that some allowance must be made for errors in estimated costs, which estimates were, after all, only rough estimates. I would therefore, reduce his estimated costs by $^1/_3$ to allow for contingencies.

As to item (3) therefore, I would hold that the plaintiffs are clearly entitled to the sum of RM26,700 (RM40,050 x 2/3) and I award that sum accordingly.

As to item (4), being the claim for the loss of the sprinkler system amounting to RM12,000, this was based on the unsupported testimony of PW1 who claimed that her sprinkler was imported from Italy. The person who installed the sprinkler system was not called to testify.

Counsel for the defendants quite correctly drew my attention to the fact that, under cross-examination, PW1 had admitted that it was P2 who paid for the installation of the sprinkler system, but P2 had earlier testified that she did not know anything about this.

I do not, therefore, consider that the plaintiffs' claim under this head has been properly substantiated. In my view, on the evidence, I do not think that the plaintiffs would be entitled to any sum in excess of RM6,000 as replacement costs of the sprinkler system, and I award that sum accordingly.

As to item (5), being the plaintiffs' claim for loss of farm income (including loss of income for the area etched black in exh P14 at the rate of RM5,100 per month from April 1988 and still continuing, amounting to RM224,400 (RM5,100 x 44), my observations regarding the infirmities in the plaintiffs' claim for loss of income arising out of the trespass committed by D1 and D2 on 18 June 1982 would apply equally to it, but mutatis mutandis.

Similarly, my observations regarding the value and worth of exh D53, being the report containing the results of the socio-economic survey conducted by the district office of the North East District, Penang, on behalf of the Tripartite Committee, whose members were representatives of the State Government of Penang, the developers of Thean Teik Estate, and the Thean Teik Estate Residents' Association, would also apply equally to this part of the plaintiffs' claims, but mutatis mutandis.

I also consider that the period of 44 months' loss of income claimed in respect of past loss of farm income is a fair period to adopt in assessing damages under this head.

Accordingly, I would award in favour of P1 and P2, and against D3 and D4, in respect of loss of farm income (including loss of income for the area etched black in P14) for the period of 44 months with effect from April 1988, that being the specific period claimed, at the rate of RM900 per month, the sum of RM39,600 to be apportioned between P1 and P2, having regard to their respective incomes aforesaid.

I have not overlooked the plaintiffs' claim for loss of future profits under this head. But, having carefully considered it, I do not consider that the plaintiffs' have substatiated it sufficiently, or at all. Upon the evidence, I do not consider that it has been proved that the plaintiffs would have continued their farming activities indefinitely had D3 and D4 not committed the act of trespass complained of.

(vi) Claim for exemplary damages

I next turn to consider the plaintiffs' claim for exemplary damages.

In a famous passage in his judgment in *Rookes v Barnard*,[88] Lord Devlin, with the unanimous approval of all his brethren, reviewed the law and laid

down that exemplary damages could only be awarded in three categories of cases; namely, oppressive action by officers of the Crown; secondly, cases where 'a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk'; and thirdly, where statute expressly authorized it.

In addition, Lord Devlin went further and spelt out three 'considerations' applicable to all cases of exemplary damages: first, that the plaintiff cannot recover such damages unless he is himself the victim of such 'punishable behaviour'; secondly, 'exemplary' damages can be used both for and against liberty, and are a punishment without the safeguard of the criminal law, so that the weapon must be used with restraint, and the House might have 'to place some arbitrary limit on such awards' despite the respect due to assessment of damages by juries; and thirdly, the financial means of the parties, though irrelevant to compensatory damages are relevant to exemplary damages.

The fact that exemplary and compensatory damages must thus be presented differently to the jury, Lord Devlin also indicated, did not necessarily mean that the jury must make two separate awards. It should, however, be directed that exemplary damages should only come into play if it regards the amount which it has fixed for compensation as inadequate in the circumstances to punish and deter the defendant and mark its disapproval for his conduct.

In *Cassell & Co Ltd v Broome*,[89] Lord Morris explained the ambit of the expression 'calculated to make a profit' used by Lord Devlin in *Rookes v Barnard*.[88] This was how he put it at p 843:

> There may be exemplary damages if a defendant has formed and been guided by the view that though he may have to pay some damages or compensation because of what he intends to do yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.

The particular facts upon which counsel for the plaintiffs relied as justifying an award of exemplary damages, may conveniently be taken from his written submission, were these:

(1) In 1982, D1 and D3 required the portion etched black in P14 for their development but took no steps to obtain possession by lawful means. The tenancies had not been determined and the plaintiffs' equity satisfied. No legal proceedings were commenced to recover posssession, although one month before the trespass, P1 and P2, by their solicitors, had warned D1 not to enter the portion. They took the law into their own hands and levelled the portion.

(2) The earthwork carried out by D1 and D3 was illegal since there were no approved earthworks plans. (See the evidence of DW4 under cross-

examination.) There were no approved plans then for the construction of the sewage treatment plant and the LLN substation. The object of the exercise was to harass and intimidate the farmers, including the plaintiffs, into settling with D1 on D1's terms.

(3) Instead of admitting and being sorry for their unlawful act, the defendants have fabricated the incredible story that PW1 consented to their levelling the said portion.

(4) Because the plaintiffs instituted legal proceedings against D1 and D2, D1 induced the Khoo Kongsi to issue notices purportedly terminating the tenancies.

(5) In 1988, although there was a case pending in court in which the issue was whether the plaintiffs' possession of the portion of land occupied by their farm and houses was protected by equity and law, D3 and D4, with impunity and without any regard for the pending case and without waiting for a judical decision on the rights of the plaintiffs with regard to the said portion, entered the plaintiffs' farm by force and demolished the chicken coops, pigsties and structures and levelled the vegetable farm.

(6) In breach of the injunction dated 7 April 1988, D3 and D4 have committed the following unlawful acts:

(i) on 21 August 1988, they levelled a part of the vegetable farm subject to the injunction. The defendants disputed this and contended that on that day they were working on Khoo Bak Chun's farm. PW1 testified that the defendants were working on her farm. She produced photographs in support of her story. Why did the defendants not call Khoo Bak Chun to testify to their story? An adverse inference should be drawn against the defendants for failing to call Khoo Bak Chun;

(ii) DW4 have admitted that D3 and D4 constructed an LLN substation and sewage plant on the portion etched black in P14 after 7 April 1988, ie the date of the injunction order;

(iii) D3 and D4 have destroyed the drainage system of the farm and raised the ground level of the adjoining land, causing the flooding of the farm;

(iv) in breach of the injunction, D3 and D4 have been extracting water from the pond in the farm; and

(v) D3 and D4 caused dangerous objects to drop on the roof of house No 259H during their building operations.

In summing up this part of his claim, counsel for the plaintiffs said this:

> It is clear from the above that D3 and D4 were using harrassing tactics, including the destruction of the plaintiffs' source of livelihood, to recover possession of the portion of land in the plaintiffs' possession. They did not institute any legal proceedings against the plaintiffs to recover possession of the land. Although the plaintiffs commenced legal proceedings against D1 and D2 in 1982, D3 filed a counterclaim for possession only in 1990, that is eight years later. If there is to be any respect for the law, the court should show its unqualified disapproval of the defendants' arrogant display of power and influence and contemptuous disregard for the law by the award of exemplary damages.

A The following comment by Lord Denning in *Drane v Evangelou & Ors*[3][at p 441] would equally apply to this case:

> As this case unfolded before us, the circumstances in which this young couple were forced out of the house, the in-laws being pushed in, the landlord ... not complying with the injunction ... it did seem to me a case in which, in Lord
B Devlin's words, it was necessary 'to teach the landlord a lesson'.

In reply, counsel for the defendants submitted that the plaintiffs were not entitled to exemplary damages because:

(a) D1 and D3 were entitled to develop the land under the agreements with the consent of the Khoo Kongsi;
C (b) the plaintiffs could not claim to be fee simple owners of the lands and, after the expiry of the notices to quit, they were trespassers; and
(c) D1 and D3 carried out the demolition works in the honest belief that they were entitled to do; D1 in the belief that it had the consent of PW1 and D3 after the failure of the negotiations, and in the belief that it was
D entitled to following the decision of Mustapha J dissolving the injunction and the decision of the Supreme Court in *Poh Swee Siang*'s case[10] that the remedy of self-help was available in this country.

It would be more convenient if I now considered the submissions of counsel for the defendants.

E As to (a), I do not consider that the fact that D1 and D3 were entitled to develop the land under the joint-venture agreement with the Khoo Kongsi would also provide them with a license to act in disregard of the plaintiffs' rights in the plot concerned. I have already made my finding as to why I consider that D1 and D3 had committed the acts of trespass concerned and so I need say nothing more about this point.

F As to (b), I have already given my reasons for finding that after the expiry of the notices to quit, the plaintiffs continued to be in lawful occupation of the farm and the two dwelling houses, and I need say nothing more about this point.

As to (c), counsel for the defendants had argued that the plaintiffs were
G not entitled to claim exemplary damages on three separate grounds, namely:

(1) that D1 and D3 were entitled under the joint-venture agreement with the trustees of the Khoo Kongsi to develop the lands therein described, including the plot concerned;
(2) that upon expiry of the notices to quit, the plaintiffs continued in
H occupation of the farm and the two dwelling houses No 258K and No 259H as tresspassers and that having regard to the decision of Mustapha J dissolving the injunction hereinbefore mentioned, and the decision of the Supreme Court in *Poh Siew Siang*'s case,[10] D1 and D3 were entitled to invoke the common law remedy of self-help by using reasonable force to eject the plaintiffs; and
I (3) that in any event, D1 and D3 had carried out the demolition works with the consent of PW1.

I regret that I cannot accede to any of these submissions, for they fail to take into account or give proper weight to the following facts:

In the present suit, the primary issues were: what was the area of the land of which the plaintiffs were in possession? Whether their tenancy thereof and their tenancies of the two dwelling houses thereon, had been duly determined by the notices to quit served upon them, assuming the plaintiffs' occupation were not protected by an equity or equitable estoppel and, alternatively, if it were not so protected? In the case of dwelling house No 258K, a further issue was whether the plaintiffs were entitled to invoke the protection of the Control of Rent Act 1966.

For the defendants, it was contended that the tenancies of the farm and the two dwelling houses were mere monthly tenancies, which, upon termination by notice to quit, rendered the plaintiffs' continued occupation thereof, unlawful and that they were therefore mere trespassers.

But with indecent haste, and without waiting for the determination of the issues aforesaid by the court, D3 and D4 entered the plaintiffs' farm by force of arms, levelling it and, in the process, demolishing the chicken coops, pigsties, storehouses and other structures thereon.

Not content with these acts of wanton destruction, D3 and D4 went even further and violated an injunction of this court granted on 17 April 1988 in the following way:

(a) on 21 August 1988, they levelled a part of the plaintiffs' farm and then claimed that they were working not on the plot concerned but on Khoo Bak Chun's land. However, Khoo Bak Chun was not called to testify and I have already found, having regard to the testimony of PW1 which I believe, supported by the photographs she produced, that D3 and D4 were, at the material time, indeed working on the plaintiffs' farm;
(b) it was freely admitted by DW4 that D3 and D4 had constructed an LLN substation and sewage plant on the area etched black in P14 subsequent to the date of the injunction dated 7 April 1988;
(c) D3 and D4 had, subsequent to the grant of the injunction, destroyed the drainage system on the plaintiffs' vegetable land and raised the ground level of the adjoining land, thereby causing the farm to become flooded;
(d) D3 and D4 had also, subsequent to the grant of the injunction, extracted water from the pond situated on the plaintiffs' farm; and
(e) D3 and D4 had finally, in the course of their construction work on neighbouring land, caused objects to drop upon the roof of dwelling house No 259H, causing damage, distress and anxiety to its occupants.

I have already found upon the facts that there is no truth in the allegation that D3 and D4 had carried out the demolition works with the consent of the plaintiffs' sister-in-law, Cheng Lye Hiang (PW1).

Trespass is normally associated with intentional acts even though committed by mistake; for mistake is no defence. (See *Basely v Clarkson.*[90]) It follows, therefore, that the story of D1 and D3 that they carried out the demolition works concerned in the honest belief that they were entitled to do so (even if true, and this I cannot accept) is no defence. Their mistaken view of the law, in particular the effect of the decision of Mustapha J in dissolving the injunction and the decision of the Supreme Court in *Poh Siew Siang*'s case[10] as to the availability of self-help, is therefore no defence to an

A action for trespass. It is, also in my view, no answer to the claims for exemplary damages having regard to the particular circumstances of this case.

I would go further and find, on the facts, that the probabilities are that the defendants, who, at all material times, were represented by solicitors, must have known that their rights to develop the lands under the joint-venture agreement entered into with the trustees of the Khoo Kongsi, could provide them with no defence to an action in trespass by occupiers thereof in the event of their notices to quit being held in a court of law to be ineffective to terminate the tenancies of those occupiers. If therefore, the defendants chose to take the risk in case the issue of validity of the notices to quit should be answered against them, they have only themselves to blame.

Turning to the submissions of counsel for the plaintiffs on the question of exemplary damages, I have recapitulated these submissions and it is my considered view that there is substance in them.

The evidence amply justifies the conclusions, both of fact and law, for which he is contending and accordingly uphold them.

(vii)Assessment of the quantum of exemplary damages

The next question which requires consideration is what is the appropriate sum to award the plaintiffs by way of exemplary damages.

In *Rookes v Barnard*,[88] Lord Devlin expressed the view that awards of exemplary damages should be moderate and that the resources of the parties was a relevant consideration. It follows from this that a modest award would make no impact on a defendant who is well-off, while conversely, even a modest award could work a great hardship on a defendant of modest means.

The other factors which must be taken into consideration is the quantum of the compensatory award (per Lord Devlin in *Rookes*' case[88] at p 1218) as well as the conduct of the parties right down to the time of the judgment. (See *Praed v Graham*.[91])

In the circumstances, in so far as the claims arising from the trespass on 18 June 1982 are concerned, I would award in favour of the plaintiffs, against D1 and D2, the sum of RM20,000 by way of exemplary damages, which would be a little more than 25% of the compensatory damages amounting to RM68,700 I had awarded them in respect of the losses suffered by them arising from that trespass.

Turning to the claim for exemplary damages arising from the acts of trespass on 17 March 1988, committed by D3 and D4, it is self-evident that these acts were considerably more serious than those attributable to D1 and D2, bearing in mind the damage caused which had been highlighted in the submissions of counsel for the plaintiffs. Moreover, it must also be self-evident that D3's and D4's conduct has been more reprehensible than that of D1 and D2, bearing in mind the violations of the injunction granted by this court. I am satisfied, for the reason stated, that these violations were deliberate and in utter disregard of the plaintiffs' rights and the authority of this court.

It follows that any sum which this court awards by way of exemplary damages for these acts of trespass, must reflect the gravity of that wrongdoing. In the circumstances, I would award in favour of the plaintiffs and against D3 and D4, the sum of RM40,000 by way of exemplary damages in respect of the acts of trespass committed on 17 March 1988 and on 21 August 1988.

I would add that, in making the two awards of exemplary damages, I have kept in the forefront of my mind the principles and the considerations enunciated by Lord Devlin in *Rookes v Barnard*,[88] to which I have referred.

I further award in favour of the plaintiffs, interest at the rate of 6%pa on all compensatory damages awarded for the period from the date of service of the writ until the date of judgment under s 11 of the Civil Law Act 1956 and thereafter, at the rate of 8%pa until satisfaction under O 42 r 12 of the RHC.

Finally, I award in favour of the plaintiffs the costs of the action to be taxed by the senior assistant registrar in default of agreement between the parties.

Order accordingly.

Reported by Premala Pathmanathan